SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 624. 19 ;

PHOENIX FINANCE CORPORATION, A CORPORATION OF THE STATE OF DELAWARE, PETITIONER,

VS.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE, RESPONDENT.

BRIEF FOR RESPONDENT, IOWA-WISCONSIN BRIDGE COMPANY.

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Counsel for Respondent.

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BRIEF OF RESPONDENT.

FOREWORD.

In answer to the page of petitioner's brief entitled "Foreword" respondent states that the opinion of the Supreme Court of New Castle County, Delaware, there referred to is a pure importation and not a part of this record, never offered in evidence, nor claimed to have come into existence until March 18, 1940, while the instant case was submitted on hearing on permanent injunction on the 11th day of March, 1940 (R. *1, 293). Hearing was

*1. Wherever in this brief reference is made to the Record on Supplemental and Ancillary proceedings, the letter "R" will be used in the brief.

had on motion for preliminary injunction and resistance thereto, in this cause, on Sept. 28, 1939, and injunction granted Oct. 7, 1939 (R. 136).

This case involves *res judicata* of decrees and orders rendered in a cause pending in the Federal Court for the Northern District of Iowa, not controlled by Delaware law, but by the laws of the State of Iowa and the decisions of the Iowa Supreme Court and of the Federal Courts.

OPINIONS BELOW.

The original decisions of the District Court (F.R. *2, 156 to 204 and 208 to 211 and 411 to 413) are reported in 19 Fed. Supp. 127, and the opinion of the Circuit Court of Appeals for the Eighth Circuit on the first appeal (F.R. Vol. VI, 1689 to 1709), is reported in 98 Fed. (2) 416. On permanent writ of injunction the District Court's findings of fact and conclusions of law appear (R. 700 to 717), opinion of the District Court (R. 717 to 719), and is reported in 32 Fed. Supp. 277, and final decree on permanent injunction appears in the record (R. 719 to 722). The opinion and decree of the Circuit Court of Appeals on permanent writ of injunction appears in the record (R. 767 to 788), and is reported in 115 Fed. (2) 1.

***2. Whenever in this brief reference is made to the Original or First Record in this cause on the former petition in this court for certiorari by Phoenix Finance Corporation (No. 438, October Term, 1938), the letters "F.R." will be used in the reference, and the letters "F.R. Supp." will be used in the reference to the supplemental volume thereof; and whenever reference is made to the Record on Supplemental and Ancillary proceedings, the letter "R" will be used in the reference.**

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on August 26, 1940 (R. 787-788). The petition for writ of certiorari was filed on the 13th day of December, 1940. The jurisdiction of this court is sought to be invoked under sub-paragraph 2 of Section 240 of the Federal Judicial Code as amended (28 U.S.C.A., Sec. 247).

QUESTIONS PRESENTED.

Whether the final decree of permanent injunction of the District Court and the affirmance thereof by the Circuit Court of Appeals is correct.

STATEMENT OF THE CASE.

Preliminary Statement.

The respondent, instead of filing a supplemental brief, files this as a complete new brief, so that everything on its part may be contained in one brief.

The petitioner in its brief refers to the summary statement of its petition for writ of certiorari and then sets forth what it calls an enlarged statement of the facts. Both of such statements are saturated with statements not supported by the record, to such an extent that the true character of the case before the trial court is not revealed. We therefore think that we can best serve this court by setting forth a concise statement of the issues and facts of the case before the trial court, to show the relationship of the parties to this cause, the identity of the subject matter of each of the Delaware cases with the matters determined in this cause and the identity of mortgage recorded with that involved in the original trial of this cause.

We are not unmindful of the doctrine of this court that the concurrent decisions of two courts upon questions of fact in a suit in equity will be followed unless clearly shown erroneous.

Brainard v. *Buck*, 184 U. S. 99.
Dunn v. *Lumbermen's Credit Assn.*, 209 U. S. 20.
Alabama Power Co. v. *Ickes*, 302 U. S. 464.

The trial court and the circuit court both found as facts that the matters involved in the Delaware actions and the $50,000 mortgage were involved in and adjudicated in this cause. However, since the petitioner is asserting that it is not bound by the adjudications, and that the matters involved in the five Delaware actions are not identical with those involved in this case, we are compelled to set forth sufficiently the issues and facts to demonstrate that the petitioner is bound, and that the identical matters were involved in and adjudicated in this case, so that they may be brought to the attention of this court if this court desires to review the facts. It makes it somewhat lengthy, but this is unavoidable on account of the petitioner's contentions, and the character of its attack on the record.

Nature of the Case.

A supplemental and ancillary bill for preliminary and permanent injunction to enforce the decrees and orders of the court and to restrain and enjoin the vexatious violation thereof and to protect the fruits of such decrees and orders.

Issues on Supplemental and Ancillary Bill.

The Iowa-Wisconsin Bridge Company, defendant in this cause, on the 18th day of September, 1939, moved

the court for leave to file a supplemental and ancillary bill, notice of which was served on Phoenix Finance Corporation, and on hearing leave was granted to file such a supplemental and ancillary bill (R. 1, 2).

The supplemental and ancillary bill as amended (R. 3-12, 98-100) alleges:

(1) That the above entitled cause was commenced by the Bechtel Trust Company (now First Trust and Savings Bank) and A. H. Schubert, as trustees on an alleged deed of trust and bonds, at the request and instigation of the complainant Phoenix Finance Corporation against the Iowa-Wisconsin Bridge Company, and that a receiver was appointed of all the property of the Iowa-Wisconsin Bridge Company and that thereafter petitions of intervention were filed by interveners with leave and by order of court to defend said action; and that Phoenix Finance Corporation was made a party complainant by order of court; and that said cause was heard and decree rendered.

(2) That on the 1st day of December, 1936, the court filed its opinion and findings of fact and the final decree, which were entered of record, copies of which are attached to the supplemental and ancillary bill as Exhibits "A," "B," and "C" (see R. 13-68). That by said final decree all matters and differences between the complainant Phoenix Finance Corporation and its predecessor, Phoenix Finance System, Inc., on the one hand and the Iowa-Wisconsin Bridge Company on the other, were fully settled, adjudicated and determined and that since the entry of said decree there had been no business transacted whatsoever between the said defendant Iowa-Wisconsin Bridge Company and the said complainant Phoenix Finance Corporation, or its predecessor.

(3) That following the entry of the decree aforesaid, the complainant, Phoenix Finance Corporation, filed a petition for re-hearing and prayed in the alternative that the decree be modified so as to withhold from adjudication the question of the validity of the $50,000 mortgage dated March 10, 1931, by permitting Phoenix Finance Corporation to institute an action at law against the bridge company if it so desired, for money had and received and to re-invest in said Phoenix Finance Corporation 517 shares of "A" stock, surrendered in exchange for bonds; that the petition for re-hearing and petition for modification of decree were denied, and that a copy of the order of the court overruling the petition for re-hearing and motion for modification of the original decree is attached to and marked Exhibit "D" and made a part of the supplemental and ancillary bill (R. 68-71).

(4) That appeal from the said decree, rulings, orders and adjudications of the trial court was taken to the Circuit Court of Appeals for the 8th Circuit by the above named complainants where the same were affirmed, a copy of the opinion of said court being attached (R. 71-93).

That petition for writ of certiorari to the Supreme Court of the United States was denied and the mandate of the Circuit Court of Appeals was issued on the 3rd day of April, 1939, and on the 6th day of April, 1939, was filed and entered in the office of the clerk of the trial court (R. 697-709).

(5) That the above entitled action was commenced about the 28th day of August, 1933. That a large number of depositions were taken which involved a great deal of time, very voluminous transcripts, hundreds of exhibits. That the trial of this cause before the Master involved a

number of weeks and at the said trial a large amount of additional oral testimony was taken; that the hearing before the court on exceptions involved months of work, and that the hearing before the trial court to settle the record of this cause before the Circuit Court of Appeals involved many weeks of additional work. That this cause was defended against the unjust claims of Phoenix Finance Corporation at great expense to the bridge company, and in said actions the various claims of Phoenix Finance Corporation were fully heard and adjudicated. That to re-litigate the matters determined, piecemeal or otherwise, would subject the bridge company to great expense and impair its credit and business to its irreparable injury.

(6) That notwithstanding the final adjudications and orders of the District Court of the United States for the Northern District of Iowa, the complainant, Phoenix Finance Corporation, is disregarding said adjudications and orders, and for the purposes of attempting to invalidate and nullify the decree and order of said court, and for the purpose of depriving the defendant, Iowa-Wisconsin Bridge Company, of the fruits of said adjudications, and for the purpose of harassing, vexing, annoying and destroying the business of said defendant, has commenced and is prosecuting and is about to prosecute in the State of Delaware numerous and divers suits and actions involving the same matters fully and finally determined by the United States District Court for the Northern District of Iowa, and has further and in contempt of said court filed for record and recorded the $50,000 mortgage hereinbefore and hereinafter referred to, held by said court to be fraudulent and invalid.

(7) That, in particular, said Phoenix Finance Corporation has commenced and is prosecuting the following suits against the defendant:

a. On or about September 29, 1938, an action in the Superior Court of the State of Delaware, in and for New Castle County, the alleged cause of action being based on two alleged promissory notes, one of $2,000 dated December 15, 1932, and one of $3,125 dated January 20, 1933, which were involved in the above entitled cause and the adjudication thereof; that in this cause it was claimed that said notes and the alleged consideration thereof formed part of the consideration for the issuance of $20,100 of the bonds involved in this action. That the trial court had found that said bonds were fraudulently issued and wholly without consideration, and were more than offset by indebtedness of Phoenix Finance Corporation and its predecessor, Phoenix Finance System, Inc., to the bridge company. That in the cause in Delaware, the defendant bridge company had interposed the defense of *res judicata* and other defenses, such as want of consideration. That the cause was tried on the issues raised by the plea of *res judicata*, but had not yet been determined by the Delaware court (R. 5-6).

(b) On or about the 20th day of February, 1939, an action in the Court of Chancery in the State of Delaware in and for New Castle County, bill of complaint asking to recover 517 shares of Class "A" stock of the bridge company, which were surrendered and cancelled at the time Phoenix Finance Corporation fraudulently procured the issuance of $60,500 of bonds involved in and found in this action, which stock the trial court and the Circuit Court of Appeals ordered adjudged, and found Phoenix was not entitled to have re-issued to it. That the bridge

company had answered in that cause, but the cause had not been tried (R. 5-6).

(c) On or about the 22nd day of June, 1939, an action in the Superior Court of Delaware in and for New Castle County, declaration and affidavit of demand in which was filed on September 18, 1939 (R. 104), based upon an alleged promissory note of $500, dated December 31, 1932, an alleged promissory note of $12,110.19, dated July 7, 1933, an alleged claim for $15,000 for money claimed to have been lent and advanced by defendant to plaintiff in that case, and upon an alleged claim for $7,000 claimed to have been for money due and payable from the defendant to the plaintiff in that case, Phoenix Finance Corporation, for interest and forbearance. That the said alleged promissory notes of $500 and $12,110.19 were involved in the above entitled cause, and the adjudication thereof; that in this cause it was claimed that said notes and the alleged considerations therefor formed part of the consideration for the issuance of $20,100 of bonds involved in this action. That the trial court found that the said bonds were fraudulently issued and wholly without consideration, and were more than offset by an indebtedness of Phoenix Finance Corporation and its predecessor to the defendant bridge company. That as to the alleged claim for $15,000 this is a mere restatement of the alleged cause of action on the notes aforesaid, stated in different form, and in the alternative, and the alleged claim for $7,000 is merely a claim for interest on the notes aforesaid stated in different form and in the alternative. That all of the alleged claims were involved in and adjudicated in the above entitled cause in the trial court (R. 7, 98).

(d) On or about June 22, 1939, an action in the Superior Court of Delaware in and for New Castle County, declaration and affidavit of demand in which was filed on September 18, 1939 (R. 104), based on an alleged agreement claimed to have been entered into between Phoenix Finance System, Inc., John W. Shaffer & Company and Iowa-Wisconsin Bridge Company, dated November 10, 1930, under and by virtue of which said Phoenix Finance Corporation claims defendant became indebted to Phoenix Finance System, Inc., in the sum of $21,262.71, claims to be the assignee of said Phoenix Finance System, Inc., and claims the total amount of $50,000 for principal and interest (R. 99); that attached to the declaration in said case is a copy of said purported agreement (see R. 321-338, particularly 336-338). The said agreement so referred to in said declaration, and sued upon, is the same agreement described and referred to by the court in its findings of fact No. 24, appearing at pages 13, 14 and 15 of Exhibit "B" attached to the supplemental and ancillary bill of complaint (see R. 51, 52), which the trial court found to be without consideration, a fraud upon the bridge company, void and *ultra vires* (R. 7, 98-99).

(e) On the 11th day of July, 1939, an action in the Superior Court of Delaware in and for New Castle County, declaration and affidavit of demand in which was filed September 18, 1939 (R. 104), based on certain of the bonds which were involved in the above entitled action, to-wit: One Series "B" bond No. 93, in the face amount of $500; one Series "B" bond No. 97, in the face amount of $500. That the trial court in its final decree adjudged and held that all bonds held by Phoenix Finance Corporation were invalid, fraudulent and issued

without consideration, and that it found certain bonds which had been issued to Helmer Anderson in the total amount of $7,400 to be valid to the extent of $6,000 only, and directed that the said sum of $6,000 be paid from income of the bridge company; that said Series "B" bonds, Nos. 93 and 97, upon which suit has been commenced in the State of Delaware, as hereinbefore set forth, are portions of the $7,400 of the bonds issued to Helmer Anderson and allowed in part by the trial court as aforesaid (R. 7, 99).

(f) This paragraph alleged a Delaware action to recover on $5000 of toll tickets claimed to have been adjudicated, but the court did not grant injunction with respect to that action (R. 7-8, 136).

(8) That defendant had had no business with Phoenix Finance Corporation since the commencement of this action (R. 100).

(9) That John A. Thompson, who had been found by the trial court to control Phoenix Finance Corporation, while dominating and controlling the bridge company in a fraudulent scheme, plan and conspiracy to cheat and defraud the bridge company and its stockholders, as president of Phoenix Finance Corporation, asserted on the 6th day of December, 1939, after the decision of the United States Supreme Court, in substance, that the litigation involved in this action was not ended and would not be ended for a good many years; and on July 8, 1939, further asserted that one case had been tried in the courts of Delaware; that the matters involved in this case were not over, and that there were six cases in the State of Delaware that would be carried on in the course of the next few months (R. 8-10).

(10) This paragraph alleges in substance that John A. Thompson on the 23rd day of November, 1938, wrote to the stockholders of the bridge company:

> "In the end the facts will all be proved in competent courts. I am not a bit disturbed about the outcome."

That on the 12th day of June, 1939, John A. Thompson, president of the Phoenix Finance Corporation, wrote to a stockholder and director of the bridge company:

> "As to the $97,000 of bonds, even if the mortgage deed of trust has been adjudicated and eliminated and it is still shown that the bridge company owes the $97,000 for legitimate borrowings, it makes little difference whether the bridge company pays the debt by reason of a mortgage foreclosure or by way of judgment and execution against the bridge. * * * These $20,100 of bonds were pledged as collateral against the bridge company notes for borrowed money, totaling $17,735.19."

That there were suits pending in Delaware and that there was not the slightest chance that the items involved in this cause would not be collected because the Phoenix in Delaware would have an opportunity to present its evidence, which was never done in any of the proceedings in the Federal Court (R. 9-10).

(11) That on June 2, 1939, the said John A. Thompson and Phoenix Finance Corporation caused to be recorded in Allamakee County, Iowa, the alleged mortgage of the bridge company to Phoenix Finance System, Inc., for $50,000.00, dated March 10, 1931, which the trial court had found to be without consideration, fraudulent and void, issued as part of a scheme, plan and conspiracy to cheat and defraud the bridge company and its stock-

holders, and by the recording of the said alleged mortgage Phoenix has wrongfully cast a cloud upon the title of the bridge company to its property, and has attempted to render null and void that portion of the decree and order of the trial court finally determining the invalidity of said mortgage (R. 10).

(12) That the complainant, Phoenix Finance Company, is threatening to and unless restrained by the court will proceed to institute and prosecute the actions hereinbefore referred to and will permit to remain on record the invalid $50,000 mortgage aforesaid; that unless said complainant, Phoenix Finance Corporation, is restrained as prayed, the defendant bridge company will be deprived of the fruits and advantages of the judgment, decrees and orders of the court in this cause, and Phoenix will continue with vexatious suits in utter disregard thereof. That the acts of Phoenix will cast a cloud over defendant bridge company's franchise because of a multiplicity of vexatious suits brought and to be brought against the defendant bridge company, and said bridge company will be damaged in a way that cannot be repaired or estimated at common law, and that from these threatened wrongs the defendant has no remedy at common law, but the only remedy is in equity (R. 10, 11).

The bill then prayed for a preliminary and permanent, prohibitive and mandatory injunction, restraining and enjoining Phoenix Finance Corporation, its officers, agents, servants, employees and attorneys, etc., from proceeding with the suits in Delaware referred to in the bill and to forthwith dismiss them, etc., to satisfy and remove from the records the $50,000 mortgage hereinbefore referred to, and to surrender the original of said mortgage and purported notes secured thereby to the court for cancellation, and for general equitable relief (R. 11, 12).

Preliminary Injunction.

On the 18th day of September, 1939, the bridge company filed motion for preliminary injunction against the Phoenix Finance Corporation as prayed in the supplemental and ancillary bill (R. 101 to 103), and on September 28th, 1939, Phoenix filed resistance thereto (R. 112-118), and on that day hearing was had on the motion and resistance thereto, and the matter submitted subject to filing of briefs by both sides within five days (R. 119). And Phoenix was directed to file its answer to the supplemental and ancillary bill as amended within ten days (R. 119). On October 7, 1939, the court filed its findings of fact and conclusions of law (R. 120 to 131), and on that day entered an order granting preliminary injunction (R. 132-140), as prayed, except as to the "ticket case," referred to in paragraph 7-f of the bill as amended (R. 7-8, 99-100, 136). On November 6, 1939, the court made a modification of the preliminary injunction as to release of mortgage and maintenance of the status quo (R. 145-146).

Answer and Proceedings Thereon.

On October 9, 1939, Phoenix filed answer to supplemental and ancillary bill as amended and cross bill (R. 747), to which the bridge company filed a motion to strike and supplement and second supplement to said motion (R. 747-748). On November 11, 1939, the court entered an order sustaining the bridge company's supplement and second supplement to motion to strike, striking the Phoenix answer and counterclaim as amended in its entirety and ordering the Phoenix to answer the bridge company's complaint as amended within twenty days, the answer to conform to rule 8 of the Rules of Civil Procedure (R. 749).

On November 27, 1939, Phoenix filed a voluminous answer and counterclaim (R. 146-167).

On the 28th day of November, 1939, defendant bridge company filed a motion (R. 167-169) (1) to strike answer and counterclaims of Phoenix Finance Corporation in its entirety for the reasons: that it is saturated with alleged evidence, argument, foreign matter and conclusions and in violation of rule 8 of the Rules of Civil Procedure, particularly subdivision (b), and is prolix.

(2) Subject to the court's ruling on division (1) thereof, to strike from paragraph 1 of said answer and counterclaim, the last three lines commencing with the words "but alleges" on page 1 and the remainder of said paragraph on page 2 on the ground that same is argument and conclusions.

(3) Subject to the court's ruling on division (1) thereof, to strike from said answer and counter-claim alleged defenses and counter-claims 2 to 7 inclusive, consisting of paragraphs 13 to 45, both inclusive, and to strike each of said defenses and counter-claims and each of said paragraphs separtately, for the following reasons, to-wit:

(a) That the same are saturated with alleged evidence, argument, foreign matter and conclusions in violation of rule 8 of the Rules of Civil Procedure and particularly subdivision (b) and are prolix.

(b) That the matters pleaded in said alleged defenses and paragraphs are insufficient in law to constitute a defense to the supplemental and ancillary bill of complaint, and are not responsive to the issue tendered by the supplemental and ancillary bill, and are repetitious, incompetent, irrelevant and redundant matter.

(c) That the matters involved in this cause and presented by the supplemental and ancillary bill as amended have been adjudicated and that a counter-claim cannot be filed subsequent to such adjudication; that the matters alleged do not constitute any basis for counter-claim and that the alleged counter-claim is included in the answer without leave or permission of the court, and that the matters alleged in said paragraphs are sham, impertinent and contemptuous matter. *3.

On the 18th day of December, 1939, the court entered an order (R. 171-172) which provided:

"First, that there be stricken from said answer paragraph 1, 'first defense,' all that part on page 1, following the word 'only' on the next to the last line of said paragraph, and the quoted paragraph at the top of page 2 of said answer (see R. 147, lines 15 to 21).

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*3. "SECOND DEFENSE." (R. 151.) The allegations under this heading of the answer do not constitute a defense. The trustees represented all the bondholders, and Phoenix Finance Corporation itself was made a party under proper order of court, and on it and the trustees rested the burden of coming forward with any claim of innocent holders. No such proof was presented. The question of consideration of the Helmer N. Anderson bonds was fully litigated and determined, and Phoenix, a party to the action, cannot now assert that after the commencement of the action, and just prior to the rendition of the decree, it acquired part of such bonds, and that it is therefore entitled to any other or different rights than as provided in the decree. (F.R. 695; 37-38; 43-44; 1478-1482; 790-794; 11; 160-162-166; 68-72; 86; 11-92; 102-103; 92-97; 17-98; 614-616; 538-637.)

"THIRD DEFENSE." (R. 152.) The allegations under this heading are not responsive to the allegations of the ancillary bill and do not constitute a defense and are immaterial and statements of legal opinions and conclusions. It is a mere suggestion that the decrees and orders of the court be disregarded and that a plea of res judicata be raised and tried in some other jurisdiction at great expense. The trial court had power to enforce obedience to its orders and decrees and to protect the fruits of victory granted thereby.

"Second, that there be stricken from said answers numerical paragraphs 13 to 45, inclusive, being designated defenses 2nd to 7th, inclusive (R. 151-157), for the reason that in such paragraphs and defenses the respondent, Phoenix Finance Corporation, is clearly endeavoring to relitigate questions of fact and law which were litigated and opportunity given to litigate on the trial of the principal case, in which trial and decision all accounts, indebtedness and matters entered into, the consideration of the issue of each and all of the bonds secured by the mortgage sought to be foreclosed were in question and were considered and determined.

"The court being of the opinion that the remaining matters, including admissions and denials set forth in the first division of said answer, designated as 'first defense' are sufficient for the proper consideration and

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"FOURTH DEFENSE AND FIFTH DEFENSE." (R. 152-153.) The original pleadings were part of the record and it was not necessary nor proper to make them part of the answer to ancillary bill by reference. The allegations under these headings are a mere rehash of what had been previously determined by the trial court and the Circuit Court of Appeals (opinion of trial court, 19 Fed. Supp. 128, 8 C.C.A., 98 Fed. (2) 460), and constitute no defense whatever to the ancillary bill as amended, are a repetition of denials of alleged first defense and statements of conclusions.

"SIXTH DEFENSE AND SEVENTH DEFENSE." The allegations of the answer under these headings are not responsive nor germane to the issues tendered by the supplemental and ancillary bill. They are a mere repetition of Phoenix' contentions on the original trial which the trial court and the Circuit Court of Appeals found were not well founded and so adjudicated and are in contravention of the record. (See opinion and findings of fact of the trial court, original hearing, F.R. opinion 156-179; findings 179-202; decree 202-204; 19 Fed. Supp. 127; opinion, Circuit Court Appeals, F.R. 1689-1709; decree, F.R. 1709; Phoenix' petition for rehearing, F.R. 1710 to 1716, order overruling petition and mandate, F.R. 1716.) Counter-claim based on matters adjudicated by original findings and decree cannot be pleaded in defense to the enforcement of such decree. Ashby v. Manley, 191 Iowa 113, 116, 181 N. W. 869. The allegations are incompetent, irrelevant and immaterial, and conclusions and argumentative, foreign matter. Rules Civil Procedure, Rule 12-F.

determination of all issues presented by said supplemental and ancillary complaint, no further time is granted or permission granted to further amend said answers."

That part of the answer of Phoenix not stricken by the court, designated as "first defense" is as follows:

1. Denies each and every allegation of paragraph 1, except that it admits the above entitled cause was commenced by said trustees on a certain deed of trust and bonds at the formal request of Phoenix; that a receiver was appointed of all the property of the bridge company, and that thereafter petitions of intervention were filed by the above named intervenors with leave of court, and that Phoenix was by order of court made a party complainant, but alleges that by said order it was made a nominal complainant only, and alleges that the said receivership was solely that incident to the foreclosure and not a general receivership (R. 147).

"PARAGRAPHS 40, 41 and 42." (R. 164-166.) The assertion in these paragraphs of the answer that when this cause was submitted to the Master it was supposed that only the question of foreclosure of the mortgage was involved and that the matter of the validity of the bonds was postponed for later hearing is directly contrary to and in contravention of the record. No such question existed before the Master. The validity and consideration of both the mortgage deed of trust and bonds were directly submitted to him. (F.R. 107-108.)) On oral argument before the Master on the 25th day of October, 1935, it was stated by counsel for the parties that the entire case was submitted. (F.R. 694-695.) The Master made his report. Exceptions of trustees and of Phoenix were filed to such report. (F.R. Supp. 3-61.) And the trial court spent months of time going over the entire record as to the foundation of each and every bond and made its decision. Phoenix then filed a petition for rehearing, making like allegations as now alleged. (F.R. 207-218.) And said petition for re-hearing was adopted by the trustees in their motion for dismissal and in the alternative for rehearing. (F.R. 214; also see answer to petition for rehearing supported by affidavits, F.R. 394-410.) The petitions for rehearing were overruled. (Court's order and opinion, F.R. 411-413; 19 Fed. Supp. 127 at 142.) On first appeal to the Circuit Court of Appeals Phoenix, by its assignments of error 60 and 64, presented the question of alleged abuse of discretion in the denial of its petition for rehearing, (a) because

2. Admits the first sentence of paragraph 2 and denies each and every allegation of the second sentence of paragraph 2 (R. 147).

3. Denies each and every allegation of paragraph 3, except that it admits that after the entry of the decree aforesaid it filed a petition for rehearing, with an alternative prayer, but alleges that said alternative prayer was in words and figures as follows:

Second. In case rehearing is denied, then as alternative relief that the decree be modified so as to withhold from adjudication the question of the validity of the $50,000 mortgage, given by the bridge company to petitioner, reserving the right to petitioner to litigate said mortgage in another action, if it so desires.

Third. In case rehearing is denied, the decree be so modified as to reinvest in petitioner 517 shares of "A" stock surrendered in exchange for bonds.

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of alleged misunderstanding of complainant's counsel as to the issues in the case that were being tried (assignment 60, F.R. 527), and (b) overruling petition for rehearing. (Assignment 64, F.R. 528.) There was no misunderstanding as to the issues being tried before the Master. The Circuit Court of Appeals went over the entire record and affirmed the trial court's decision. (F.R. 1689 at 1694, 98 Fed. (2) 416 at 421.) Now we are met with the effrontery of Phoenix saying that all this ought to be disregarded as though Phoenix had not had a day in court, although it conducted the entire proceedings. Phoenix in these alleged and pretended defenses six and seven, is seeking to disregard the orders and decrees of the court previously made and to re-litigate what has been decided, by merely re-pleading in its answer to the ancillary bill the matters contained in its former petition for re-hearing.

Pittsburgh Reduction Co. v. Cowles Elec. S. & A. Co. (C.C.N.D. Ohio), 64 Fed. 125.

Central Trust Co. of N. Y. v. Worcester Cycle Co. (C.C. Conn.), 91 Fed. 212.

Hicks v. Otto (C.C.S.D.N.Y.), 85 Fed. 728.

Acme Flexible Clasp Co. v. Cary Mfg. Co. (C.C.S.D. N.Y.), 99 Fed. 500.

Fourth. In case rehearing is denied, that the decree be modified so as to withhold from adjudication the right of petitioner to institute an action at law against the bridge company if it so desires, for money had and received; and that it admits that the petition for rehearing and the alternative prayers were all denied by the order set forth in Exhibit D, and alleges that neither the decree nor the said order was any adjudication against Phoenix of the matters set forth in the alternative prayer (R. 147-148).

4. Admits the allegations contained in paragraph 4 (R. 148).

5. Answering paragraph 5, admits all allegations concerning date of commencement, depositions, transcripts, exhibits, and trial before Master, except the

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"PARAGRAPH 33." (R. 166.) This paragraph of the answer is in direct conflict with and in contravention of the record. The record supports the court's finding and adjudication. (See F.R. 613-616; F.R. 552; F.R. 667, folio 977; F.R. bottom 635, top 636; John A. Thompson deposition, F.R. 414-500; and particularly F.R. 425-427, 434, 435, interrogatories 200-202, and see answer to petition for rehearing and affidavits thereto attached, F.R. 396-399), and the adjudication was not reversed, but affirmed, on the first appeal.

"PARAGRAPH 44." (R. 166-167.) In this paragraph of the answer it is alleged that in support of the petition for re-hearing, counsel for Phoenix submitted affidavits of witnesses and that it endeavored to procure affidavits from other witnesses to substantiate the allegations of the petition for re-hearing, and that on account of alleged representations of counsel for interveners and an intervener, it was unable to obtain them. (R. 166-167.) The allegations in said paragraph 44 of the answer show on their face that the pretended affidavits or evidence could have been only cumulative in any event. That such a course of procedure is wholly inadmissible under the settled rule of res judicata is held in So. Pac. R. Co. v. U. S. (168 U. S. 1, 18 Sup. Ct. 18, at p. 33). The allegations are mere opinions and conclusion, incompetent, irrelevant and immaterial. There is no allegation as to what it is claimed the so-called "other witnesses" (not named) know or claimed to know with respect to the facts in this case, nor what it is claimed they would have asserted in such affidavits, or what they would testify to, nor that any of them had any connection with or to do with any of the matters involved in this

length thereof which appear in paragraph 5 prior to the allegation concerning work on exceptions, settling record, and appeal, and as to this allegation Phoenix states it is without knowledge or information sufficient to form a belief as to the truth thereof. Further answering, denies each and every allegation of paragraph 5, not herein expressly admitted (R. 148).

6. Denies each and every allegation of paragraph 6, except that it admits that it has commenced and is prosecuting, and is about to prosecute, in the State of Delaware, the suit and actions hereinafter specifically described, save as restrained by the preliminary injunction issued by the court, and admits that it has filed for record and recorded a $50,000 mortgage from the bridge company to Phoenix Finance System, Inc. (R. 148).

7. Answering paragraph 7, admits that it has commenced and it was prosecuting the following suits against

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case, or knowledge thereof. The record shows that the persons who had to do with the various transactions involved in this case were called as witnesses on depositions, or as witnesses at the trial, and nothing is alleged as to what it is claimed any of the so-called "other witnesses" would have made affidavit to not contained in evidence on the trial or in Phoenix' petition for rehearing and affidavits attached thereto. Phoenix attached to its petition for rehearing of January, 1937, the affidavits of its then counsel and thirty-six purported affidavits of stockholders, former directors and others (F.R. 216-391), and if there had been any interference with its procurement of affidavits there is no question but that the then counsel for Phoenix would have learned of that while they were gathering the numerous alleged affidavits presented, and would have asserted it in its petition for rehearing and affidavits in support thereof. The assertion [illegible]id paragraph 44 is made for the first time in 1939 when Phoenix was called upon to obey the decrees and orders of the trial court and of the Circuit Court of Appeals, and appearing by counsel from Delaware. Furthermore, if the alleged representations had been made, this record is replete with evidence that they would have been true. The trial court and the Circuit Court of Appeals found John A. Thompson to be guilty of fraudulent conspiracy and it would have been perfectly proper for interveners' counsel, if consulted, to have advised persons to be careful not to make false affidavits.

the bridge company until the entry of the preliminary injunction herein by this court:

(a) Admits that it filed the action described in paragraph 7(a), based on two promissory notes, one of $2,000 and one of $3,125; admits that this court set forth in its decree that the mortgage and bonds sought to be foreclosed were fraudulent issues and that the bonds were without valid consideration, with the exception of certain bonds aggregating $15,000; admits that in the said Delaware action the bridge company pleaded *res judicata* and other defenses, such as want of consideration, and that the said cause was tried on the issue of *res judicata* but has not yet been determined by the Delaware court, and alleges that all other defenses except *res judicata* were withdrawn by the bridge company prior to the submission of said cause. Further answering paragraph 7(a), Phoenix denies each and every allegation thereof not herein expressly admitted.

(b) Admits that it commenced the action described in paragraph 7(b), seeking the delivery to Phoenix of a new certificate for 517 shares of Class "A" stock; admits that the certificate for these shares was delivered by Phoenix to the bridge company in connection with the issue of $60,500 of bonds to the bridge company; admits that the bridge company answered in said cause in Delaware, and alleges that the bridge company has pleaded the defense of *res judicata* therein, and admits that the said cause has not been tried. Further answering, Phoenix denies each and every allegation of paragraph 7(b) not herein expressly admitted.

(c) Answering paragraph 7(c), admits the allegations thereof as contained in the original supplemental and ancillary bill before amendment. As to the matters

added by said amendment, Phoenix admits that said cause of action in Delaware is based upon promissory notes of $500 and of $12,110.19, dated as set forth in the amendment, and that said Delaware cause claimed $7,000, as interest to July 1, 1939, and admits that the common counts in the sum of $15,000 were also pleaded in said action. Admits that this court in its decree set forth that the mortgage and bonds sought to be foreclosed were fraudulently issued and that all bonds, with the exception of certain bonds aggregating $15,000, were without valid consideration. Further answering paragraph 7(c), Phoenix denies each and every allegation thereof not expressly herein admitted.

(d) Answering paragraph 7(d), Phoenix admits the allegations thereof contained in the supplemental and ancillary bill before amendment, and admits the allegations contained in the first sentence of the paragraph added to paragraph 7(d), by amendment; admits that the agreement sued upon in said Delaware action is referred to in finding No. 24 of this court. Further answering, Phoenix denies each and every allegation of paragraph 7(d) not herein expressly admitted.

(e) Answering paragraph 7(e), Phoenix admits the allegations thereof contained in the original supplemental and ancillary bill before amendment; further answering Phoenix admits that its cause of action in Delaware was based upon two Series "B" bonds of the bridge company, numbered 93 and 97, in the face amount of $500 each; admits that bonds in the total amount of $7,400 originally issued to Helmer Anderson were allowed by this court to the extent of $6,000, and were directed to be paid from the income of the bridge company, and admits that said bonds numbered 93 and 97 constitute part of the

bonds originally issued to Helmer Anderson by the bridge company. Further answering, Phoenix denies each and every allegation of paragraph 7(e) not herein expressly admitted (R. 148-150).

(f) This paragraph of the answer relates to the "toll ticket case" which was not enjoined (R. 150).

8. Denies each and every allegation of paragraph 8.

9. Denies each and every allegation of paragraph 9, except that it admits that on July 8, 1939, John A. Thompson did say that there were six cases pending in the State of Delaware that would be carried on in the course of the next few months (R. 150).

10. Denies each and every allegation of paragraph 10, except that it admits that John A. Thompson on November 23, 1938, wrote a letter to the stockholders of the bridge company, containing the substance of but not precisely, the matter as it is purported to be quoted in the supplemental and ancillary bill herein, and admits that on June 12, 1939, John A. Thompson wrote to a stockholder and director of the bridge company substantially, but not precisely, as quoted in paragraph 10 of the supplemental and ancillary bill herein, and Phoenix offers to present true and correct copies of said letters at the trial hereof (R. 150-151).

11. Denies each and every allegation of paragraph 11, except that it admits that on June 2, 1939, it caused to be recorded in the office of the county recorder, in Book L, pages 625-626 of the records of Allamakee County, Iowa, a certain mortgage executed by the bridge company to Phoenix Finance System, Inc., in the sum of $50,000, dated March 10, 1931, and admits that this court in its findings made reference to this mortgage substantially as

set forth in paragraph 11 of the supplemental and ancillary bill herein (R. 151).

12. Denies each and every allegation of paragraph 12, except that it admits that it intends to prosecute the actions hereinbefore described in paragraph 7 and proposes to permit to remain on record the $50,000 mortgage above described, to the extent that it is not restrained by the preliminary injunction of this court (R. 151).

RECORD SHOWING PROCEEDINGS HAD PRIOR TO SUPPLEMENTAL BILL.

The Original Bill.

The original bill in this case was filed by the First Trust and Savings Bank (formerly Bechtel Trust Company), resident of Iowa, and A. H. Schubert, a resident of Wisconsin, as trustees, versus Iowa-Wisconsin Bridge Company, a Delaware corporation, on August 28, 1933, for the foreclosure of a deed of trust securing an alleged $200,000 bond issue. The action was instituted at the request and instigation of appellant, Phoenix Finance Corporation, and carried on at the expense of and under the direction of said Phoenix Finance Corporation by attorneys of its selection (F.R. 537; Exhibit 28, H.E.B., F.R. 789-791, especially top 790, offered F.R. 535; Exhibit B, H.E.B., F.R. bottom 794, and top 795, offered F.R. 537; Exhibits B-1, H.E.B. (403 H.L.B.), B-2, H.E.B. (404 H.L.B.), F.R. 617; 1478-1479, B-3, B-4, B-5, B-6 and B-7, H.E.B., F.R. 1480-1482, approved as part of narrative statement, F. R. 709, 720-21, 723; Exhibit B-6, on stationery Phoenix Finance System, predecessor Phoenix Finance Corporation, signed John A. Thompson, who was president of Phoenix Finance Corporation and of its

predecessor, F.R. 1481; approved as part of narrative statement, F.R. 709, 723.)

The bill alleged jurisdiction based on diversity of citizenship, and alleged a mortgage deed of trust securing a bond issue of $200,000.00 and containing provision making it the duty of the bridge company to pay taxes on the mortgaged property (F.R. 31), to pay interest on the bonds and to pay the bonds as they matured (F.R. 29). In case of default for a period of sixty (60) days, it was provided that the trustees "may," and upon the written request of the holders of twenty-five per cent of the bonds then in default "shall" declare the principal of all the bonds due (F.R. 35), and "shall proceed to protect and enforce their rights and the rights of the bondholders, under this indenture by a suit or suits in equity or at law * * * by * * * foreclosure hereunder, or for the enforcement of any other appropriate legal or equitable remedy, as the trustees * * * shall deem most effectual" (F.R. 37-38) and in addition to Section 13 (F.R. 43-44) of the mortgage or trust deed, quoted from in the first opinion of the Circuit Court of Appeals (98 Fed. (2) 416, at 420), it also provided: "Section 10. The company covenants that (1) in case default shall be made in the payment of any interest on any bond or bonds at any time outstanding and secured by this indenture, and any such default shall continue for a period of sixty days, or (2) in case default shall be made in the payment of the principal of any such bond when the same shall become payable, whether by the regular maturity of said bond, or by declaration as authorized by this indenture, or by sale as provided in Section 6 of this article, or otherwise, then upon demand of the trustees the company will pay to the

trustees, for the benefit of the holders of the bonds and coupons hereby secured then outstanding, the whole amount due and payable on all such bonds and coupons then outstanding, for interest or principal or both, as the case may be, with interest upon the over due principal and/or installments of interest of each such bond at the coupon rate, *and in case the company shall fail to pay the same forthwith upon such demand, the trustees in their own names, and as trustees of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid.*

"*The trustees shall be entitled to recover judgment as aforesaid, either before or after or during the pendency, of any proceeding for the enforcement of the lien of this indenture upon the trust property, and the right of the trustees to recover such judgment shall not be affected by any sale hereunder, or by the exercise of any other right, power or remedy for the enforcement of the provisions of this indenture, or for the foreclosure of the lien hereof*; and in case of a sale of the mortgaged property, and of the application of the proceeds of such sale to the payment of the debt, the trustees in their own names and as trustees of an express trust, shall be entitled to enforce payment of and to receive the amount then remaining due and unpaid upon any and all bonds issued hereunder and then outstanding for the benefit of the holders thereof, and shall be entitled to recover judgment for any portion of the debt remaining unpaid, with interest * * *" (F.R. 41-42). (Emphasis supplied.)

The bill alleged that all of said bonds were duly made and executed on behalf of the bridge company, duly presented to and authenticated by Bechtel Trust Company (trust company) as in said mortgage deed of trust pro-

vided, and that all of said bonds, together with interest coupons attached thereto evidencing interest thereon as aforesaid, have now been issued for a *good and valuable consideration and are now outstanding in the hands of divers persons and corporations who are now the owners and holders thereof for value.* Said bonds and interest coupons are valid obligations of said Iowa-Wisconsin Bridge Company, and are entitled to the benefit and security of said mortgage deed of trust. The bill further alleged authority of the trustees to sue under the terms of the deed of trust, default and acceleration of due date, and prayed:

"1. That an account be taken of all property in the Northern District of Iowa subject to the lien of said mortgage deed of trust, and that said deed of trust may be decreed to be a valid first lien upon all and singular thereof.

"2. That an account may be taken of the bonds and interest coupons secured by said mortgage deed of trust and the amount *due on the bonds* for principal and interest or otherwise, and the amounts expended or to be expended by your complainants, and that said Iowa-Wisconsin Bridge Company be decreed to pay to your complainants *the amount found to be due on such accounting,* together with costs and expenditures in this proceeding and attorneys' fees by the court assessed, within a short day to be fixed by the court; and that in default of said payment the mortgaged property be sold • • • to satisfy the amount so found due and costs, and in case

of such sale the defendant * * * be barred and foreclosed of all equity of redemption. * * *. *4.

"3. * * *

"4. That in the event the proceeds of such sale shall not be sufficient to satisfy in full the decree to be rendered in this suit that these complainants *have a decree* against said Iowa-Wisconsin Bridge Company *for the deficiency.*

"5. For a receiver of all the property of the defendant.

"6. For general equitable relief (F.R. 11). (Emphasis supplied.)

An answer was filed on the part of the bridge company, which admitted diverse citizenship of the parties and admitted the issuance of certain bonds, but denied that said bonds were a valid and binding lien against the real estate of the property of the defendant; denied that the complainant was entitled to the relief prayed for and denied every matter set out in the complaint not otherwise disposed of; admitted the execution of purported mortgage deed of trust but denied the validity thereof, and denied that the amount claimed on said bonds was actually due; alleged that a large part of the bonds were improperly executed and delivered; that the defendant did not have full and complete record of the issuance or transfer of said bonds nor the consideration received

*4. This necessitated first the determination of the amount due, if any, before a short day for defendant to pay could be fixed, because otherwise it would not be known what the defendant was required to pay to avoid foreclosure.

therefor; alleged the belief that there was a good defense to all or part of complainant's claim; alleged conflicting interests of common directors of the bridge company and Phoenix Finance System, Inc.; denied complainant's right to the appointment of a receiver, and prayed the court:

"To deny complainants the appointment of a receiver and to compel complainants to make a complete showing and accounting to this court of the method and manner in which bonds were sold and delivered, the consideration paid and received therefor; and to compel complainants to show in what manner the bonds authenticated by the trustees were disposed of * * * and to compel the complainants to make a complete showing as to the consideration received in each and every instance for the delivery of authenticated bonds; and prayed the protection of the court (F.R. 62 to 66).

Appointment of Receiver.

On September 28, 1933, the court appointed a receiver of all of the property of the bridge company of every kind and took the same into legal custody (F.R. 68-72). The court then had full, complete and exclusive jurisdiction of the parties and the subject matter of the action.

Intervention.

On December 5, 1933, by leave of court, Fayette D. Kendrick, a stockholder of the bridge company, and citizen of Minnesota, intervened on behalf of defendant, himself and all other stockholders similarly situated (F.R. 73-83) praying that the complainant's bill be dismissed, the bonds cancelled and the deed of trust set aside and for general equitable relief. He alleged that John A. Thompson and his associates, officers and directors of

Phoenix Finance System, Inc., dominated the bridge company, and by the exercise of such domination, fraudulently procured the execution and delivery of the deed of trust and the issuance of the bonds to corporations controlled by them; that all of the bonds and mortgage deed of trust were issued as a part of the fraudulent scheme, plan and conspiracy with intent to cheat and defraud the bridge company and its stockholders out of their property; that in pursuance thereof part of the bonds issued were fraudulently obtained by cancelling stock and that the bonds and mortgage were fraudulent, without consideration, invalid and void; that none of the bonds had passed to innocent purchasers for value without notice; *that said John A. Thompson and his associates in conspiracy still were in control of the defendant bridge company and that demand by interveners to obtain relief from or through said defendant bridge company would be unavailing* (F.R. 73-83; Amendment to Petition of Intervention, F.R. 100 to 102). On December 5, 1933, the court granted the intervention (F.R. 85 to 86). The Master and the court found that the bridge company was not making and would not have made a good faith defense to complainant's action had not the interveners intervened (F.R. 134, par. 13; 160, par. 13, and 183).

Phoenix Finance Corporation Made an Ancillary Party—Subsequent Pleadings.

On December 5, 1933, intervener made a motion that Phoenix Finance System, Inc., and certain other corporations be made parties (F.R. 83-84). The motion was granted. The court's order provided:

> "The motion of Fayette D. Kendrick, intervener, to make additional parties plaintiff and defendant to the petition of intervention then came on for hearing

and complainant's counsel having stated in open court *that the Phoenix Finance Corporation has succeeded the Phoenix Finance System, Inc., and is the holder of the bonds* involved in this action with the exception of about $10,000 worth of said bonds. It is hereby ordered and directed that the Phoenix Finance System, Inc., and the Phoenix Finance Corporation be made parties plaintiff in this cause, and defendants to the petition of intervention and the clerk of this court is hereby directed to issue the necessary processes and summons for said purpose." (Emphasis supplied.) (F.R. 86.)

Petition of intervention was ordered to stand as an answer on behalf of the bridge company to complainant's petition (F.R. 100).

On the 8th day of December, 1933, an amendme was filed to the answer by the bridge company, alleging that John A. Thompson and others associated with him dominated and controlled Phoenix Finance System, Inc., and subsidiary or ancillary organizations and dominated and controlled the Iowa-Wisconsin Bridge Company, and while acting for said corporations and controlling the Iowa-Wisconsin Bridge Company, and its board of directors as a part of the scheme fraudulently procured bonds of the Iowa-Wisconsin Bridge Company by cancellation of bridge company stock (F.R. 67-68).

Subpoena directed to Phoenix Finance Corporation, making it a party, was duly served on said corporation (F.R. 87-88). It appeared (F.R. 89).

As stated by the Circuit Court of Appeals:

"Inasmuch as the District Court found that Phoenix Finance Corporation was in all respects, so far as concerns this case, the successor of Phoenix Finance System, Inc., and managed by the same

officers, both corporations are hereinafter indiscriminately referred to as Phoenix" (98 Fed. (2) 416, at 419).

On February 23, 1934, Phoenix Finance Corporation filed an answer to the petition of intervention on information and belief denying all the allegations thereof, and alleging that it was the *owner and holder for value of a large amount of bonds of the Iowa-Wisconsin Bridge Company* issued in accordance with the mortgage declared on in the bill of foreclosure, asked "that its rights as holder of bonds be fully protected" and prayed for general equitable relief. (Emphasis supplied.) (F.R. 91-92.)

The trustees filed reply to the petition of intervention denying the allegations thereof and pleading ratification by the corporation by payment of *interest on bonds*, and estoppel from asserting the invalidity of the mortgage *or bonds*, as to both the corporation and its stockholders (F.R. 102-103).

Petitioner on page 14 of its brief states: "There were no pleadings of any character directed against or naming Phoenix Finance Corporation, this petitioner," and that it was made a party by *ex parte* statements.

Phoenix Finance Corporation was already a party in the lawsuit by representation by the trustees, with all the pleadings applying, and as such a party by representation was bound by the proceedings in the case. The statement that Phoenix Finance Corporation had succeeded Phoenix Finance System, Inc., was made by complainant's counsel, who were of Phoenix Finance Corporation's selection. and the court upon such succession appearing properly ordered the Phoenix Finance Corporation to be made a party, and upon it thus being made

a party the pleadings on file applied to it, as fully as though the petition of intervention had been amended, inserting its name therein in lieu of that of Phoenix Finance System, Inc. It made no objection to being made a party; did not move for further pleading, but filed answer to the petition of intervention and the trial proceeded, and it is too late to object in supplemental proceedings that additional pleadings or amendments were not filed. The Phoenix Finance Corporation is bound without them. *5.

Petitioner on page 14 of its brief asserts: "The relationship between these corporations was simply that of vendor and vendee, respectively, of certain assets."

This assertion is in direct contravention of the court's finding No. 41 (F.R. 202) in the original trial, "That Phoenix Finance Corporation, at the time of its organization was officered and controlled by the same officers as Phoenix Finance System, Inc., and took over the succession of both assets and liabilities with full notice of the facts and circumstances surrounding the bond issue in controversy in this case, and assumed the entire fruits and activities of its predecessor, so far as

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*5. **Himes v. Smith** (6 C.C.A.), 270 Fed. 132, cert. den. 255 U. S. 576, 41 S. Ct. 448, 65 L. ed. 792.

Davis v. Zirkle, 80 Ind. A. 396, 138 N. E. 266.

Crary v. Kurtz, 132 Iowa 105, 107, 105 N. W. 990.

Nome & Sinook v. Ames Merc. Co. (9 C.C.A.), 187 Fed. 928.

Bell v. Corbin, 146 Ind. 269, 36 N. E. 23.

See 34 C. J., Sec. 1410, p. 994.

Rule 15-b of the Rules of Civil Procedure provides:

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the pleadings."

Also see Rule 12-h, Rules of Civil Procedure.

concerns this case, and proceeded to carry on with the same notice and purpose, adopting all the plans and results of its predecessor."

This finding was approved by the Circuit Court of Appeals on the first appeal (F.R. 1610), in which certiorari was denied by this court, and is *res judicata,* not subject to re-examination in this ancillary proceeding. The record shows that purported bridge company bonds held by Phoenix Finance Corporation were by resolution of the board of directors of the bridge company while controlled by John A. Thompson, president of both Phoenix Finance System, Inc., and Phoenix Finance Corporation, and his associates on March 7, 1932, directed to be delivered to the Phoenix Finance System, Inc., in payment of alleged obligations of the bridge company to Phoenix Finance System, Inc., found fraudulent and without consideration by the court on the original trial (F.R. 201-202, 979 to 982).

Through like control the board of directors of the bridge company by resolution on July 8, 1933, directed $20,100 additional bonds of the bridge company to be delivered to Phoenix Finance Corporation as collateral security for the payment of obligations originating with the Phoenix Finance System, Inc., and to pay interest on fraudulent bonds and some other items found without consideration by the court on the original trial (F.R. 1027-1029; bottom 203, top 204; bottom 1704, top 1705). The record shows that the Phoenix Finance Corporation took up the conspiracy where the Phoenix Finance System, Inc., left off. The bond issue and mortgage securing it were all the result of a single deliberate fraudulent scheme to obtain possession of the bridge and freeze out its stockholders, starting with the $50,-

000 mortgage and culminating with the foreclosure proceedings, and participated in by both Phoenix Finance System, Inc., and its successor, Phoenix Finance Corporation. (Opinion District Court F.R. 157, 412-413; opinion Circuit Court of Appeals F.R. 1708.) The court's original findings are fully sustained and are *res judicata* and we do not feel justified in pursuing the matter further. *6.

On April 24, 1934, the court entered an order that Phoenix Finance Corporation produce all of its books and records pertaining to the business and affairs of the Iowa-Wisconsin Bridge Company (F.R. 97-98), but such books and records were never produced (F.R. 614-616, bottom 396, top 397; 552; 675; bottom 635, top 636; 425; 434 interrogatory 200; 435 interrogatory 202).

Other stockholders of the bridge company, residents of Iowa, intervened, and adopted the pleadings filed by Kendrick (F.R. 106-107).

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*6. Where several persons combine to carry out a fraudulent conspiracy to cheat another, each and all of such persons are liable to the defrauded party, without reference to the amount of the fruits of the fraudulent transaction he obtains, or the degree of his activity in the scheme. * * * It is not necessary that they be in pari delicto. It is enough that each was at some time and in some degree a party and an aider of the improper transaction. Fletcher Cyc. of Corp. (Perm. ed.), Vol. 1, Sec. 198, pp. 650-655; **McCandless v. Furland**, 296 U. S. 140, 56 S. Ct. 41; **Irving Trust Co. v. Deutsch** (C.C.A.), 73 Fed. (2) 121, 123; **Jackson v. Smith**, 254 U. S. 586, 41 S. Ct. 200, 65 L. ed. 418.

Appointment of and Proceedings Before Master.

On December 5, 1934, counsel for the parties agreeing, the court appointed a special master and entered an order of reference, which provided:

> "It is ordered that this cause be and it hereby is referred to Honorable J. W. Kindig, Special Master in Chancery, to hear all of the issues in this cause, to take the evidence and proofs according to law, to examine the questions in issue and to report from said evidence his findings of fact and conclusions of law in respect to all of the issues herein, *to report his conclusions as to whether the evidence and pleadings entitle complainants or the other parties herein to the relief or any part thereof, prayed for in their respective pleadings,* and to perform all such other lawful services as may be necessary or proper in the premises, etc." (F.R. 107). (Emphasis supplied.)

On the trial before the Master the trustees appeared by the attorneys selected by the Phoenix Finance Corporation, and the Phoeonix appeared by attorney W. B. Sloan (F.R. 531), and Mr. Sloan took part and objected to testimony (F.R. 637, 656, 659, 650-651).

The complainants called John A. Thompson, president of complainant, Phoenix Finance Corporation, in their main case, who testified as to claimed considerations for the bonds, and who was cross examined on that subject. (Direct examination F.R. 538-542; cross examination F.R. 542 to 545; cross examination on part of interveners, F.R. 545-556; cross examination, F.R. 560-561; further cross examination, F.R. 562-564; further cross examination on part of interveners, F.R. 633-637; F.R. 673-675; further direct examination of Mr. Thompson on part of complainants in rebuttal, F.R. 675-678; cross ex-

amination on part of interveners, F.R. bottom 678-685; F.R. 691.)

The claimed considerations involved in the case are summarized in the first decision of the Circuit Court of Appeals, as follows, to-wit:

"The consideration claimed by appellants to have been paid by the parties to whom the bonds were issued may be summarized as follows:

"To Phoenix in consideration of

1.	In exchange for its mortgage dated March 10, 1931,		
	Principal of mortgage	$50,000.00	
	Accrued interest	3,548.56	
	Allowance to give 8% yield on bonds	12,727.31	
			66,275.87
2.	For advancements under guaranty contract of November 10, 1930, To Industrial Contracting Co.	10,000.00	
	to McClintic-Marshall Co.	11,262.71	
			21,262.71
3.	Paid Kramer & Hogg to discharge mechanic's lien		9,000.00
4.	Cash		461.42
5.	In exchange for 517 shares of bridge company stock with accrued interest		60,500.00
6.	As security for payment of taxes	3,125.00	
	Advancements	14,610.19	
		17,735.19	
			20,100.00

To attorneys as security for fee of	4,000.00	10,000.00
To Anderson for claim of	6,000.00	7,400.00
To five claimants for	5,000.00	5,000.00
	$15,000.00	$200,000.00

"It will be observed that of the total issue $22,400 of bonds were issued as security or in payment of claims against the bridge company by claimants other than Phoenix for obligations aggregating $15,000.00, and the remainder of the bonds in the sum of $177,600 were issued to Phoenix. The court and the Master found that the $15,000 of claims were meritorious, and the decree provided for their payment by the receiver.

"The important issue in the case is the question of the sufficiency of the consideration for the $177,600 of bonds issued to Phoenix" (F.R. 1689 at 1700-1707; 92 Fed. (2) 416 at 424).

The above $461.42 being charged to the account of Phoenix on the books of the bridge company (F.R. 981).

The complainants by the testimony of their witness, John A. Thompson, president of the Phoenix Finance Corporation, claimed consideration for the bonds, as shown in the above summary. As to items 1, 2, 3 and 4 of said summary, see Thompson testimony on part of complainants (F.R. 541) and the minutes referred to in said testimony appearing in Exhibit 6 (H.L.B.) were offered in evidence by complainants (F.R. 979-981; F.R. 539; and Thompson testimony F.R. 562-563; and Exhibit A-2 H.E.B. 843, offered 564.)

Item one of said summary is the mortgage involved herein (see ancillary bill, paragraph 3, R. 4, paragraph 6, R. 5, paragraphs 11 and 12, R. 10, and Exhibits SC-6 and

SC-7, R. 374-385, offered R. 268 to 269.) Item two are the items involved in one Delaware suit herein involved. (See ancillary bill as amended, paragraph 7, sub (d), R. 7 and R. 98-99, and Exhibit SC-4, R. 320-339; particularly 334, offered R. 267-268.)

As to item five of said summary, see Thompson's testimony on part of complainants (F.R. 541). Said item five is involved in the Delaware suit in chancery, herein involved. (See ancillary bill, paragraph 3, R. 4, paragraph 7, sub. (b), R. 6, and Exhibit SC-2, R. 301-307, offered R. 267.)

As to item six of said summary as claimed consideration, see Thompson's testimony on part of complainants. (F.R. 542, 563, and Ex. A-2, H.E.B., F.R. 843-844, offered F.R. 564, Ex. 28, H.E.B., F.R. 829, offered F.R. 562, and see F.R. 563, and F.R. 540.) Said item six of the summary includes the items of three Delaware suits involved herein. (See ancillary bill as amended, paragraph 7, sub (a), R. 5-6, paragraph 7, sub (c), R. 6 and 98, paragraph 7, sub (e), R. 7 and 99, and Exhibit SC-1, R. 294-300, offered R. 266, and Ex. SC-3, R. 307-319, offered R. 267, and Ex. SC-5, R. 340-373, particularly 343, offered R. 268.)

A large amount of testimony, depositions and exhibits were offered in evidence, as shown by the five volumes of the first record. Written briefs and arguments were filed (F.R. 693).

No Misunderstanding Submission to Master.

At the conclusion of the evidence the Master fixed a time for complainants to file briefs and arguments and likewise time for the filing of interveners' brief and de-

fendant's brief, and stated: *"I would like to have the theory of all parties definitely in reference to the consideration"* (F.R. 693).

The case was finally orally argued before the Master on October 25, 1935, and submitted in its entirety (F.R. 694).

Complainants' counsel in such oral argument stated:

> "Mr. Fowler: There is a question in this case as to whether or not at this particular time the Master should recommend that a decree of foreclosure be entered, and the question of which of the bonds are to participate be reserved or taken up at a later date. *I don't suggest for a minute that this testimony will have to be reopened.* It is whether we want to go at this in two parts. In other words, it is our contention that if any of these bonds are valid then the foreclosure must be ordered. Then the next question is which of the bonds must participate. * * *
>
> *"As I have said in our opening argument, I think under this record you can use your own judgment, the Master can use his own judgment as to whether he wants to decide this all at this time* or whether he wishes to make a recommendation to the court ordering a foreclosure of the mortgage, the determination of which bonds shall participate to be taken up at a later recommendation" (F.R. 694).

To this Mr. Ontjes, representing the interveners, said:

> *"Mr. Fowler talks about piece-meal trials. Your Honor, we didn't enter into this trial as any piece-meal proposition. We had no piece-meal ideas in our mind when Mr. Green and I presented our citation in this matter for the taking of these depositions and this evidence. It is our contention that we are trying and submitting this case in its entirety at this time,*

and if Your Honor feels, as we believe in this matter, that this mortgage and bond issue is fraudulent, then she flies out the window. There is no evidence here of any kind that anybody is an innocent holder of any of the bonds. Not a one. The record before you is that substantially, if not wholly, they are original payees of the bonds.

"Mr. Fowler: *We represent all the bondholders*" (F.R. 694-695).

Report of Master.

The Master filed his report on March 10, 1936. The Master found that John A. Thompson, president of Phoenix, dominated and controlled the bridge company, the Phoenix Finance System, Inc., and affiliated companies, and while thus controlling the bridge company took advantage of the bridge company for his controlled companies (F.R. 129-134). As to the first four items of bonds in the above summary amounting to $97,000.00, he found: That $97,000 of the bonds were transferred by the corporation to Thompson or his controlled companies on pretended book account originating out of the pretended $50,000 mortgage and pretended obligations of the bridge company, none of which were actual, except $9,000 paid to Kramer & Hogg. "That although the contract between the bridge company and the said Shaffer & Company (contractors) provided for a surety bond to insure the obligations of the said Shaffer & Company, yet the said Thompson, in manipulating and scheming and conspiring, omitted having the said Shaffer & Company furnish such bond, and that under the pretended bond, the said John W. Shaffer (John A. Thompson), through his controlled companies, pretended to perform the obligations which the said Shaffer & Company should have performed. That the said Thompson and his companies

did not, in fact, perform such obligation on behalf of the said Shaffer & Company, but simply built up a pretense on the books of the various companies to make it falsely appear that the said Shaffer & Company failed to perform its duty, and that the said Thompson, or his controlled companies expended the said $97,000 in so doing. But, as a matter of fact, the said Thompson and his controlled companies did not thus expend $97,000, but only expended the said $9,000 thereof paid to Kramer & Hogg, as aforesaid, and therefore there was no consideration for $88,000 of the said $97,000 of the bridge company bonds thus issued to the said Thompson or to his controlled companies" (F.R. 130-131). That the resolutions pretended to have been passed by the bridge company authorizing the said $97,000 issue of bonds were not genuine legal resolutions so far as the same related to said $88,000 of said bonds, but were adopted through the influence and connivance of Thompson and his associates, so far as they were concerned, and independent stockholders and directors who supported the resolution did so not knowing of the true facts relating thereto, but were deceived and misled by the misrepresentations of Thompson and the resolutions were invalid and of no effect (F.R. 132).

As to item five of the bonds in the above summary, the Master found *they were fraudulently obtained by the exchange and cancellation of 517 shares of bridge company stock* (F.R. 130). As to item six in the above summary of $20,100 of bonds, the Master found that they were without consideration except as to $3,125 (F.R. 133-134).

Exceptions to Master's Report.

The Iowa-Wisconsin Bridge Company and interveners filed exceptions to the Master's report as to said $9,000 and $3,125 issued to Phoenix Finance Corporation and as to foreclosure and as to assessment of partial costs (F.R. 148-155).

The trustees, by counsel of Phoenix's selection, filed exceptions to the Master's report (F.R. supp. trans. of record 3-14) asserting that said $97,000 of bonds were issued for good and valuable consideration (F.R. 12); and asserting that said $60,500 of bonds were issued for good and valuable consideration (F. R. 13); and that the said $20,100 of bonds were issued for good and valuable consideration (F. R. 13).

Phoenix Finance Corporation, appearing by W. B. Sloan and by additional counsel, filed voluminous exceptions to the Master's report, claiming basic considerations for all the bonds held by Phoenix (F.R. supp. trans. of record, 14-58, inc.). It was asserted in Phoenix' exception number five:

> "In support of this exception it asserts that the record discloses that the said $97,000 of bonds were in truth and in fact issued and delivered to it for a valid consideration, which valid consideration was the following:
>
> | | |
> |---|---|
> | Mortgage owing by the bridge company to Phoenix, dated March 10, 1931 | $50,000.00 |
> | Accrued interest on above mortgage | 3,222.22 |
> | Cash advanced to bridge company 11/11/31, Journal p. 58 (for payment to Kramer & Hogg) allowed by Master | 9,000.00 |
> | Cash advanced to bridge company 9/24/31, Journal p. 50 (for payment to Industrial Contracting Company) | 10,000.00 |

U. S. Treasury Certificate transferred to bridge company 12/24/31, Journal p. 62 (to make payment to McClintock-Marshall)	11,262.71
Interest on open account for the last three items above	326.34
Discount on bonds, so as to yield 6%	12,727.31
Charged to Phoenix on 3/15/32, Journal p. 76, so as to complete the balance	461.42
(Figure shown in Phoenix Finance Sheet No. 1 in Ex. 2, H. L. Bump, Notary Item Debit, March 15, said exhibit being the ledger of the Iowa-Wisconsin Bridge Co.)	
Total	$97,000.00

(F.R. Supp. (abb. for supp. trans. of record) 27.)

In said exception Phoenix claimed consideration for the $50,000 mortgage held fraudulent by the Master and the court (F.R. supp. 27; F.R. 130 to 132; F.R. 191-192). This same fraudulent mortgage dated March 10, 1931, for $50,000 was recorded in Allamakee County, Iowa, June 2, 1939 (see Exhibit SC-6, R. 374-378), and was recorded in Crawford County, Wisconsin, on the 18th day of May, 1939 (see Exhibit SC-7, R. 379-385) and is the one mentioned in paragraphs 11 and 12 of the supplemental and ancillary bill (R. 10 and 11).

The above items contained in Phoenix Finance Corporation's exception number five above quoted, Industrial Contracting Company $10,000 and McClintic-Marshall $11,262.71, total $21,262.71, are the same items as those involved in the Delaware action mentioned in paragraph 7(d) of the supplemental and ancillary bill as amended R. 7 and 98 and 99), and shown by the certified and ex-

emplified copy of the declaration in that Delaware action (see Exhibit SC-4, R. 320-339, particularly R. 334; also see court's findings 24, 25, 32, 33 and 40, F.R. 189 to 191, 194-196 and 201-202).

In Phoenix' exception number four they undertook to assert that said $60,500 of bonds were not procured fraudulently by cancellation of 517 shares of stock, but were based on consideration (F.R. supp. 23-26).

The court found that this stock was cancelled when Phoenix Finance Corporation fraudulently obtained the bonds and that it was not entitled to have it re-issued (F.R. 413). These same shares of stock are involved in the Delaware action as alleged in paragraph 3 of the supplemental and ancillary bill (R. 4), and shown by the certified exemplified copy of the declaration of such Delaware action (Exhibit SC-2, R. 301-307; also see court's finding, 39, F.R. 200-201).

In Phoenix' exception number six (F.R. 48-49), they undertook to assert that the aforesaid $20,100 of bonds had basic consideration, stating:

> "This pledge of $20,100.00 of Series B bonds were made by the bridge company to secure its four promissory notes to Phoenix Finance Corporation (Minutes, Exhibit 31, page 402, and intervener's chart, Exhibit B-28). The existence of these four notes, aggregating $17,735.19 principal amount, is without dispute in the record."

The notes are as follows:

(a) Note for $2,000.00 dated 12-15-1932, due 6-15-1933, at 8% represents cash borrowed and deposited to credit of bridge company in Iowa-Des Moines National Bank & Trust Company (see bridge company journal,

Exhibit 1, page 107, line 16, and bridge company ledger, Exhibit 2, notes payable account).

(b) Notes for $500.00 dated 12-31-1932, due 6-31-1933, at 8% to apply on account of cash and payment of bridge company debts by Phoenix Finance Corporation (see same journal, page 110, lines 5 to 7 and same ledger, notes payable account).

(c) Note for $3,125.00 dated 1-20-1933, due 7-20-1933, at 8% representing cash loaned and deposited by bridge company in Iowa-Des Moines National Bank & Trust Company (see same journal, page 114, lines 30 and 31, and same ledger, notes payable account).

(d) Note for $12,110.19, dated 7-7-1933, due on demand at 8% representing cash loaned to bridge company by direct transfer of cash and payment of bridge company debts by Phoenix Finance Corporation (see same journal, page 130, lines 1 to 12, and same ledger, notes payable account).

The execution and consideration for these four notes are corroborated and explained by bridge company minutes hereinafter referred to and by testimony of John A. Thompson, namely Thompson's Des Moines testimony, page 84, lines 16-21, as follows:

> "Then $20,100 being all of the remaining bonds, were issued as collateral to notes of the Phoenix Finance Corporation. These notes were for funds borrowed from Phoenix, the amount owing is $17,000 and some odd cents, and $12,000 note and some smaller notes" (F.R. supp. 48-49, also 49-51).

The notes and the alleged considerations therefor set forth in said Phoenix exception number six, quoted above

to-wit: one dated December 15, 1932, of $2,000.000 and one dated January 20, 1933, of $3,125.00, are the ones involved in the Delaware action as alleged in paragraph 7-a of the supplemental and ancillary bill (R. 5-6) and shown by the certified exemplified copy of the declaration in said Delaware action (Exhibit SC-1, R. 294-301, particularly see R. 298-299).

The notes and the alleged considerations set forth in said Phoenix exception number six quoted above, to-wit: one dated 7-7-1933, of $12,110.19 and one dated December 31, 1932, of $500.00 are the ones involved in the Delaware action as alleged in paragraph 7-e of the supplemental and ancillary bill as amended R. 7 and 98), and as shown by certified exemplified copy of the declaration in said Delaware action (Exhibit SC-3, R. 307-319, and particularly R. 316-317).

Opinion of Court, Findings and Decree.

The trial court filed its opinion, holding that all of the bonds issued to the Phoenix were issued without consideration and as a part of a fraudulent scheme, plan and conspiracy to cheat and defraud the bridge company and its stockholders out of their property (F.R. 156-179) and with respect to the Master's conclusion of law number five stated: "This conclusion of law is attached in the defendant and interveners' eighth exception. I think that insofar as the language of the Master's conclusion includes the $9,000 of bonds held valid in the hands of Phoenix Finance Corporation and the $3,125.00 of bonds held valid in the hands of Phoenix Finance Corporation, it is erroneous" (F.R. bottom 177; also see court's decree, F.R. bottom 203 to top 204).

The court in its findings of fact found all of the bonds held by Phoenix Finance Corporation to be without consideration, fraudulent and void, issued in fraudulent conspiracy (F. R. 179-202).

The court found that $15,000 in bonds held by individual parties other than Phoenix had consideration and in its decree made provision for them (F. R. 204). Part of such bonds were issued to Helmer Anderson and included Series B bonds numbers 98 and 97, which were allowed in part as alleged in paragraph 7(e) of the supplemental and ancillary bill as amended (R. 7-99), and as there alleged are the same bonds involved in the Delaware action alleged in said paragraph and as shown by Exhibit SC-5 (R. 340-373).

The decree, among other things, provides:

Jurisdiction is hereby reserved to deal with all matters arising under the receivership and in connection with adjustment and payment of taxes and counsel fees.

Motions of Phoenix and Trustees to Vacate Decree, for Dismissal, for Rehearing and for Modification of Decree.

On the 19th day of December, 1937, Phoenix Finance Corporation filed a motion to vacate, and expunge and set aside the decree, findings of fact, opinion, etc., on the claimed ground of want of jurisdiction (F.R. 204-205), to which motion the bridge company filed a resistance (F.R. 206-208). The motion was overruled (supp. opinion of the court, F. R. 208-211).

On January 29, 1937, the trustees filed a motion verified by John A. Thompson, president of Phoenix, for dismissal and in the alternative petition for rehear-

ing, division one claiming want of jurisdiction as claimed in Phoenix Finance Corporation's prior motion, and asking dismissal; division two in the alternative petition for rehearing, adopting the petition for rehearing of the Phoenix Finance Corporation (F.R. 211-214). On the same day, January 29, 1937, Phoenix Finance Corporation filed a petition verified by said John A. Thompson, President, for rehearing and in the alternative for modification of decree.

In this petition it was asserted:

> "That a serious and good faith misunderstanding occurred between the Master and counsel in the taking of the testimony as to the scope of the questions and issues which were on trial and the method of trial procedure which was proper to be followed."

That counsel believed that the only question properly to be considered was in reference to the validity of the mortgage deed of trust and the right of foreclosure thereunder, and that the question involving the validity of the bonds would be considered at a later date, and that it was not then necessary to introduce evidence before the Master on those questions. That as a result of such misunderstanding a large amount of material evidence as to the validity of the bonds was not introduced on behalf of complainants although available and could have been introduced, refuting all questions of fraudulent domination or control and establishing the validity and consideration of the mortgage and bonds. That

> "the Master reached his conclusions and made his findings of fact and law and recommendations without this evidence and this came before the court

and has been decided without this evidence. The facts in connection with this misunderstanding are as stated by the witnesses Chas. S. Bradshaw, Rex H. Fowler, W. B. Sloan, John A. Thompson, etc."

Attached thereto were some thirty alleged affidavits (F.R. 216-391).

We have no space in this brief to analyze the affidavits attached to the motion. Affiants John A. Thompson, John W. Shaffer, Margaret E. Lockhart, Oscar R. Thorson, M. White and Emory H. English testified at the trial. Their statements contained in their affidavits, except where they are entirely refuted by the documentray evidence in the case, and also by their own testimony given at the trial, consist largely of conclusions and opinions, which would be incompetent and inadmissible if offered in evidence, and could have had no weght to change the result as against the explicit documentary and other evidence offered at the trial. The affidavits of the other affiants were controverted in answer filed by interveners to said petitions. (F.R. 394-410; also refuted by testimony of John A. Thompson's deposition of May 10, 1934, F.R. 415-500.)

Petitioner in that part of its answer and counterclaim which was stricken, merely re-alleged the same claims as to alleged misunderstanding which had been asserted in the petition for rehearing, and on pages 14, 15 *and top of* 16 *of its brief merely re-asserts the statements contained in that petition as to the so-called "Two-Stage" theory in slightly modified language* (see F.R. 213, 214; 216-230, especially 217).

At the bottom of page 15 of its brief petitioner makes reference to defendants' Exhibit SC-106, which is not in evidence (R. 287).

Petitioner then on page 16 of its brief refers to an offer of testimony. Such proposed testimony was clearly incompetent and immaterial and in contravention of the record, and objection thereto was sustained.

Then on pages 17 and 18 of its brief petitioner refers to an *ex parte* statement of complainant trustees' counsel entitled "Suggestions" filed in connection with former petitior for writ of certiorari in this court, and then cites as record citations therefor (F.R. 224-230) claimed affidavits of said counsel attached to the same original petition for rehearing.

Then on pages 18 and 19 of its present brief petitioner quotes from affidavit of W. B. Sloan, counsel for Phoenix, filed as a part of the same petition for rehearing (F.R. 228-230).

In said petition for rehearing, it was asserted that the bridge company received full cash consideration for a large number of bonds held by Phoenix, which had been disallowed, amounting to $95,043.71 (F.R. 221), and the affidavit of Leo J. Skoner of the firm of Ernst & Ernst was attached in support thereof (F.R. 308-312). Like claims had been made in Phoenix' exceptions to the Master's report on claimed report of Ernst & Ernst in support thereof (Sup. R. 21-23) and the affidavit of Edgar S. Gage was also attached in support of said petition for rehearing (F.R. 271-276). Petitioner now, on pages 43 and 44 of its brief, refers to defendant's Exhibit SC 114, purported *ex parte* report of Ernst & Ernst, not a part of the record and to which objection was sustained (R. 292), and again makes like assertions about claimed indebtedness of the bridge company to Phoenix as made in Phoenix' exceptions to Master's report and in its petition for rehearing. That such assertions are mere repetitions of Phoenix' former assertions.

No allegation of diligence or that any evidence was newly discovered was contained in the petition. The petition prayed (F.R. 223):

> "First. That a rehearing be granted herein, and that it be given leave to present the new evidence aforesaid.
>
> "Second. In case rehearing is denied, then as alternative relief that the decree be modified so as to withhold from adjudication the question of the validity of the $50,000 mortgage given by the bridge company to petitioner, reserving the right to petitioner to litigate said mortgage in another action, if it so desired.
>
> "Third. In case rehearing is denied, the decree be so modified as to reinvest in petitioner 517 shares of 'A' stock surrendered in exchange for bonds.
>
> "Fourth. In case rehearing is denied, that the decree be modified so as to withhold from adjudication the right of petitioner to institute an action at law against the bridge company, if it so desires, for money had and received."

Answer to Petition for Rehearing.

On February 18, 1937, the bridge company and interveners filed answer to the petitions for rehearing and modification of decree (F.R. 394-398) supported by affidavits denying that there was any misunderstanding as to the issues tried before the Special Master, and stating that the consent order of reference in this cause referred the whole case and all matters involved therein to the Master. That the hearing before the Master involved the validity of the bonds, and the want of consideration, as well as the validity of the deed of trust. That the Master did not acquiesce in a limitation of the scope of the

hearing. That it was stated at the beginning of such hearing by interveners' counsel that the validity of all the alleged bonds and the want of consideration and the validity of the trust deed were involved in the trial. * * * That depositions were taken and evidence offered on all such issues. * * * That complainants had full opportunity to present all evidence on their part, and that there was no showing of any diligence on their part excusing the presenting of any evidence claimed to have any foundation or to be material. * * * That the cause was pending for about two years before the hearing before a Master, during which numerous depositions were taken with respect to the fraudulent issue of the bonds and the want of consideration of such bonds, and the fraudulent character of the deed of trust, which depositions were all filed six months or more before the trial and hearing before the Master commenced, and that complainants were at all times fully advised that all such matters were involved in the hearing and had full opportunity to present all evidence on their part. That all of the witnesses who made affidavits were known to and available to complainants at all times during the hearing, and that some of them were witnesses and testified by deposition or orally at the trial. That no single affidavit presented nor claimed to present newly discovered evidence. That the whole mass of affidavits constituted mere repetition and accumulation of evidence taken at the trial and contained in the record, or at least evidence which could have been offered if complainants had so desired. That the affidavit of John A. Thompson was contradicted by his testimony on trial. That the court made an order for the production of the books of the Phoenix Finance Corporation but the complainants resisted the making of such order and failed and refused

to produce the books of Phoenix Finance Corporation and that at all times during the taking of depositions and during the hearing before the Master, refused to produce such books and refused to produce the books of Phoenix Finance, Inc., and of Thompson & Company. That said John A. Thompson, as shown by the evidence, moved said records to Florida. That the complainants were given every opportunity during the taking of depositions and of the hearing before the Master to produce such books but refused to produce them, and that there is no showing of diligence on their part for failure to produce the alleged and pretended evidence referred to in petition for rehearing. That there was no misunderstanding, nor any inadvertence or oversight.

That the alleged $50,000 mortgage to the Phoenix Finance System, Inc., was made and was also released as a part of the fraudulent scheme, plan and conspiracy and that the 517 shares of capital stock surrendered to the bridge company were so turned over as a part of the fraudulent scheme, plan and conspiracy and to fraudulently procure from the bridge company $60,500 of bonds fraudulently issued and that such transactions were but part and parcel of the fraudulent scheme, plan and conspiracy and that the complainants are not entitled to have the fraudulent mortgage reinstated nor the stock returned. That money or property used to perpetrate a fraud cannot be recovered.

That the pretended evidence presented by the petitions and affidavits would not change the result (F.R. 394-398). That the whole field of alleged considerations of bonds was covered in the depositions taken preparatory to trial and in the evidence taken at the trial in detail (F.R. 405).

And the answer further otherwise fully answered all of the claims of the petition for rehearing and modification of decree (F.R. 394-410). (Also see John A. Thompson deposition taken prior to trial (F.R. 414-500).) *7.

Order of Court on Motions of Trustees and Phoenix.

On the 18th day of February, 1937, the motion of Phoenix and the trustees to vacate the decree for want of jurisdiction and petitions for rehearing were heard and on the 4th day of March, 1937, the court filed its order and opinion, denying said motion and petitions (F.R. 411-413). The court in its opinion stated:

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*7. Rehearing in equity cases will be denied when the grounds offered pertain to matters of evidence which could just as well have been produced on the trial already had and the evidence sought to be introduced is not newly discovered, but was known to counsel before final hearing.

Hicks v. Otto (C.C.S.D.N.Y.), 85 Fed. 728.

Acme Flexible Clasp Co. v. Cary Mfg. Co. (C.C.S.D. N.Y.), 99 Fed. 500.

Central Trust Co. of N. Y. v. Worcester Cycle Co. (C.C. Conn.), 91 Fed. 212.

In the case of Pittsburgh Reduction Co. v. Cowles Elec. Co. (C.C.N.D. Ohio), 64 Fed. 125, the court in its opinion on pages 127 and 128 says:

> "The ground of the first paragraph of the motion as elucidated in the oral presentation of it is peculiar. It is, in effect, that complainants' counsel by their argument misled the defendant and its counsel into taking a wrong view as to the issue of the cause; now, having discovered the real issue to be something other than it was supposed to be, **defendant wishes to adduce more evidence** and make further argument on the new issue heretofore successfully obscured and concealed from the defendant, its counsel and the court by the ingenuity of complainants' counsel. Defendant's **present** counsel expressly disclaims the slightest intention to impeach the good faith or professional skill of defendant's former counsel, but merely contend that in this case the arguments on behalf of complainants were so persistently sophistical and calculated to mislead that a serious mistake was made by the solicitors for defendant."

"The petition for rehearing filed by Phoenix Finance Corporation and adopted by the plaintiff trustees, rests upon the claim that the Master to whom the cause was referred in its entirety, received the submission under a misapprehension, and that the plaintiffs had also been of impression that they were to take further testimony at some future time when they submitted their bonds to the Master or to the court. They further contend that the cause in behalf of the trustees and the Phoenix Finance Corporation was mismanaged by their counsel, and that now having taken in new blood at the bar, the present counsel should be given a chance to try the case over.

"Having in mind the analogy of petitions for rehearing in equity cases and motions for new trial in law causes, the court is unable to find any substantial merit in any of the claims for a rehearing. The defense interposed to the plaintiffs' cause of action was that the bond issue and mortgage securing the same were all a part of a deliberate fraudulent scheme to obtain possession and ownership of the bridge after its completion and freeze out all of the stockholders. This scheme as alleged and as proven, dated back to the inception of a certain $50,000 mortgage, and proceeded forward including the plans and their execution for the issuing of the bonds and mortgaging of the bridge. During all of this time the Phoenix Finance System, Inc., and its successor, Phoenix Finance Corporation, and the bridge company had interlocking directorates. The so-called Thompson interests predominated in all of them. As the Master pointed out in his fourth conclusion of law, in the circumstances with the charge of fraud and conspiracy made, the burden was on the plaintiffs who had brought the suit at the instance of the Phoenix corporations, to show clean hands and fair dealing. This the plaintiffs not only failed to do, but throughout combatted the inter-

veners who were permitted to defend in behalf of the bridge company. The interveners obtained an order of court for the production of the books and records of the Phoenix Finance Corporation before the Master, but Phoenix Finance Corporation vigorously and successfully it appears prevented the production of those books and records, and its officer when on the stand before the Master, declared his inability to produce, for they had been sent to the State of Florida. It is now with poor grace that the plaintiffs invoke the discretion of the court for a rehearing in order to use those very books and records. Anticipating an adverse ruling, the petitioners alternatively pray for a modification of the decree with provisions commanding the re-issuing of certain shares of stock to Phoenix Finance Corporation, which it cancelled when fraudulently obtaining the bonds. One might conceive some invidious analogies to this situation. Having attempted the strong box of another, and being hoist by what is now claimed to be a premature explosion, they volubly invoke the compassion of the court to restore valuable implements of their craft left behind. I see no reason why a court of equity should be deeply concerned in giving an affirmative relief to the Phoenix Finance Corporation. On the other hand, I think the petitions for rehearing should be denied and the motion to dismiss and vacate the decree overruled, and it will be so ordered" (F.R. 412-413).

This ruling of the court was assigned as error on appeal (trustees' assignments 24 and 26, F.R. 507), (Phoenix' assignments 60, 61, 62, 63, 64, 65, F.R. 527, 528), and was affirmed and is *res judicata of the fact that there was no misunderstanding in the submission before the Master and is res judicata of the other matters*

covered by said ruling and now attempted to be again asserted by petitioner, and finally disposed of the matters discussed by petition on pages 44, 45 and 46 of its brief.

The decision is *res judicata* of the assertions made in petitioner's brief on pages 46, 47, 48, 49, 51 and 52 as to its claim that the books were produced as required by the order, and that copies of pertinent entries were furnished counsel for interveners. The petitioner in support of those assertions refers back to pages of the first record, all of which were before the court when the original decision was made. Petitioner attempts to explain away the admissions of non-production of the books contained in the testimony of Phoenix officers, John A. Thompson and Emory H. English in the first record. That is a mere re-argument of the petition for rehearing. That testimony was passed on in the original decision, *which is res judicata that the books were not produced*, and cannot be collaterally attacked as was attempted by petitioner. If, as now claimed, the books were produced prior to, or at the time of the original hearing in 1935, and copies of entries furnished, it is strange that the president of Phoenix and its counsel could not think of that at the time of the hearing of the petition for rehearing, when it was directly stated in the answer to the petition, supported by affidavit, that they were not produced.

There was no motion filed by complainants to set aside the decision on the ground that the books were prduced, nor was that claimed on appeal from that decision. Such production is claimed for the first time in

this ancillary proceeding (R. 166). The fact is neither the books nor any entries therefrom were produced. The record fully sustains the court's decision. *8. (F.R. 613; 614-615; F.R. 97-98; F.R. 552, 675; 635-636; 414-500, particularly F.R. 425-427, interrogatory 200 F.R. 434; interrogatory 202, F.R. 435; answer to petition for rehearing paragraph 5, F.R. 396-397.)

Paragraph 43 of petitioner's answer and counterclaim to ancillary bill quoted on page 48 of its brief which was stricken is not responsive to the ancillary bill, in contravention of the decision and an attempted collateral attack upon it and a mere attempt to re-litigate what was decided on petition for rehearing.

Phoenix Fully Represented at Trial.

Petitioner on page 19 of its brief asserts:

"While Mr. Sloan's name appears at the opening of the hearing before the Master, he examined no witnesses and directed no cross examination and made but one ob-

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*8. Emory H. English, vice-president and director of the Phoenix Finance Corporation, testified on his deposition taken November 27, 1934 (F.R. 613): "I was vice-president of Phoenix Finance System, Inc., from October, 1928, until some time during 1932. The records of Phoenix Finance Corporation are at St. Petersburg, Florida. With respect to the minute book and records of the Phoenix Finance Corporation bearing on the succession of the Phoenix Finance Corporation in the holding of the bonds involved in this suit, those records are all in the hands of the president and secretary and not in my possession nor under my control. I do not have possession of the stock records of the Phoenix Finance Corporation to show the manner of succession to Phoenix Finance System, Inc., and the manner in which this transfer was made as relating to the bonds. I do not have any way to bring those books here, no authority over them. My duties are in relation to the loan department. Q. They are all in the possession of John A. Thompson and M. K. Thompson, as I understand? A. ..... None of those books and records of the Phoenix Finance Corporation as they relate to its holdings of bonds involved in this suit are in Des Moines, nor have they been during the year

jection to evidence." That is a deliberate misstatement of the record. He not only made the objection cited by petitioner, but made numerous other objections while interveners were offering their evidence and argued the admissibility of evidence (F.R. 656, 659, 660, 661). The record has been reduced to narrative form and for this reason all the examinations, objections, arguments and statements made by counsel during the trial do not appear. Therefore it does not appear from the record how many objections and arguments were made by Mr. Sloan in addition to those appearing on the pages just cited.

The following very significant statement by Mr. Sloan appears in the record (F.R. 660):

1934 to my knowledge unless Mr. Thompson may have had some of the books with him on some trip and may have carried it back, but I never saw it and I don't know anything about it. (F.R. 614-615.) (The order for their production was entered April 24, 1934, which directed their production within ten days, F.R. 97-98.) I do not have in my possession or under my control the instrument or instruments by which the assets of Phoenix Finance Corporation were transferred or passed over to the Phoenix Finance Corporation. I presume they are in the same place. I never saw them. I as vice-president am unable to produce them. Q. Will you as vice-president communicate with Mr. Thompson to produce those books? A. It would be beyond the scope of my authority; I could not direct him. I don't know whether I have control of any of the bonds of the bridge company involved in this action or not. Some of those bonds are in the safety deposit box in the bank. I have never handled the bonds except when I first signed them as an officer of the bridge company. I never received them from the bridge company. I didn't deposit them at the bank and I don't think that I have control over them. I have not looked for the books of the Phoenix Finance System, Inc., for March, 1931." (F.R. 615-616.)

John A. Thompson testified on the trial: "I will not produce the books of the Phoenix Finance System, Inc., for the month of March, 1931. These are the books that are in Florida. Mr. T. V. Kiernan has charge of the books in Florida. He is an attorney. He does some of our work, but not our principal attorney. (F.R. 552.) T. V. Kiernan is my brother-in-law. (F.R. 675.) T. V. Kiernan is the one who has charge of the books of the Phoenix Finance System, Inc., which are in Florida. He spends practically all of his time at the

"The Master: This is admitted on the limited question of waiver and whether this witness waived the right to object to the *bond issue in view of complainants' pleading of waiver.*

"Mr. Sloan: If the Master please, we have *not pled* that any individual stockholder waived anything. *We pleaded* that the corporation, by virtue of its conduct here, has elected to take certain corporate procedure and *is estopped from asserting the invalidity of the bonds;* that there is no mention made as to any individual stockholder coming in and claiming that the records are fraudulently kept and don't mean what they say. There is no issue of that kind at all."

There was no pleading of estoppel by Phoenix in its answer (F.R. 91-92). The plea of estoppel was in the complainant trustees' reply to the petition of interven-

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office of the corporations in which I am interested in in Florida and those books are in the same building that my office is in, but not in the same room. The original minute book of the Phoenix Finance Corporation is in St. Petersburg. (F.R. 635-636.) (Also see John A. Thompson deposition taken May, 1934, F.R. 414-500, particularly F.R. 425-427, interrogatory 200, F.R. 434, interrogatory 202, F.R. 435.)

The answer of the bridge company and interveners to petition for re-hearing stated:

"This court made an order for the production of books and papers of the Phoenix Finance Corporation prior to trial; that the complainants resisted the making of such order and following the making of such order failed and refused to produce the books and records of the Phoenix Finance Corporation and have at all times during the taking of the depositions and during the hearing before the Master refused to produce such books and papers and refused to produce the books of the Phoenix Finance System, Inc., and of Thompson & Company; that the said John A. Thompson, as shown by the evidence, moved such records to Florida; that the complainants were given every opportunity during the taking of the depositions and on the hearing before the Master to produce such books and records for examination, but at all times refused to produce them and wilfully and deliberately refused to produce them in evidence." (This answer was duly supported by affidavit, F.R. 396-399.)

tion (F.R. 103). It is apparent from Mr. Sloan's statements "We have not pled," "We plead," etc., that he and the trustees' attorneys were acting together and that they considered the trustees' pleadings the pleadings of Phoenix. The attorneys for the trustees, of Phoenix' selection, represented the bondholders, the parties interested in the lawsuit. The bondholders had the interest, not the trustees. The attorneys for the trustees were the original attorneys and naturally acted as chief counsel.

The record shows that Mr. Sloan filed his appearance for Phoenix (F.R. 89) and answer for it (F.R. 91-92). The Master gave him notice of the hearing before him (F.R. 113). His appearance is properly noted as present at the trial (F.R. 531). It is also noted at the taking of a deposition (F.R. 414). He signed Phoenix' exceptions to the Master's report (F.R. Sup. 58) and Phoenix' motion to vacate decree (F.R. 205), along with other counsel for Phoenix and Phoenix' petition for rehearing (F.R. 223) and most of the affidavits thereto attached recite that they were made at his and Mr. Senneff's requests (F.R. 257, 259, 261, 263, 267, 271). The trustees through their counsel adopted Phoenix' petition for rehearing (F.R. 214). He worked in harmony with counsel for trustees and along the same line. (See his and their objections to testimony on part of intervener, F.R. 658-661.) They were both selected by the same party, Phoenix.

Petitioner at page 21 of its brief states: "At the hearing before the Master Mr. Fowler gave specific notice that he did not represent Phoenix." That is a misstatement of the record. Turning to the citation given therefor (F.R. 669) it will be noted that Mr. Fowler said that he did not represent the Phoenix Finance System, Inc., on December 22, 1931, when bridge company directors

adopted a resolution, not that he did not represent Phoenix as counsel for the trustees at the trial before the Master in 1935. Upon submission before the Master he said: "We represent all the bondholders" (F.R. 695).

Petitioner asserts on page 48 of its brief that counsel for the interveners and for the bridge company before the Master and on exceptions to the Master's report repeatedly asserted and represented that the indebtedness of the bridge company to any bondholder was not in issue and could not be adjudicated in such foreclosure proceedings, and refers to page 40 of its answer and counterclaim (R. 165) stricken, asserting that such statements were relied on. These statements are not supported by the record.

The petition of intervention as amended alleged that the bonds were issued without consideration in a fraudulent scheme and conspiracy with intent to cheat and defraud the bridge company and it stockholders out of their property (F.R. 73-83; 100-102). None of such allegations were withdrawn. Phoenix' answer denied the allegations thereof and alleged "That it is the owner and holder *for value* of a large amount of the bonds of the Iowa-Wisconsin Bridge Company, etc" (F.R. 91). That answer was not amended nor withdrawn. The trustees replied denying the allegations of the petition of intervention (F.R. 102-103). That was not amended nor withdrawn nor were the allegations of consideration contained in the bill of complaint nor prayer for deficiency judgment withdrawn. Complainants called Phoenix' president, Thompson, to prove the claimed considerations for the bonds (R. 538-545). He was cross examined and further cross examined by interveners' counsel to show want of consideration for the bonds. (F.R. 545-556, 560-561, 564, 633-637, 651-653, 673-675; further examina-

tion by complainants' counsel 676-678; further cross examination on same subject of considerations by interveners' counsel, F.R. 678-685, 691, at which point the case closed.)

Interveners continued to introduce evidence to show want of consideration until the conclusion of the trial (F.R. 561-691.) The Master then stated: "I would like to have the theory of all parties definitely in reference to the consideration" (F.R. 693). Both the Master and the court passed on the question of considerations for the bonds and the court awarded recovery to the extent of considerations actually received by the bridge company. The trustees and Phoenix filed exceptions to the Master's report, reiterating all the claimed considerations of Phoenix for bonds in detail (F.R. supp. 2 to 14 and 14-58, particularly F.R. supp. 27-30, 48-49). They continuously asserted that the considerations of the bonds were in issue and presented them as in issue. On appeal they re-asserted the claimed considerations (trustees' assignments, F.R. 502-507; Phoenix' assignments F.R. 508-528; Circuit Court of Appeals' decision, F.R. 1689-1709). Neither in their exceptions to the Master's report, nor in their petition for rehearing nor on their first appeal did trustees or Phoenix claim that counsel for the interveners and for the bridge company represented that the consideration was not in issue nor that they relied on any such claimed representations. The record shows the contrary. In their petition for rehearing they asked to have the decree modified to withhold from adjudication the question of consideration, but made no claim whatsoever that they had in any manner been misled by or relied on any statement made by interveners' counsel or by bridge company's counsel, nor was any such

claim made on appeal. Any such claim would have had to have been asserted promptly, and cannot be asserted in a collateral attack on the orders and decrees, and the allegations of paragraph 40 of Phoenix' answer and counter-claim to ancillary bill stricken are in contravention of the record and a mere attempted collateral attack upon it. Trustees and Phoenix continuously asserted that the considerations for the bonds were in issue until there was a final determination against them was affirmed by the Circuit Court of Appeals. *9.

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*9. Petitioner in its note 28 on pages 48 and 49 of its brief avails itself of going outside the record with a statement, "At the trial of the supplemental and ancillary cause counsel for the bridge company asked the court to take judicial notice of all records, papers and files in the cause. The proof thus available is as follows:" and then proceeds outside the record with the making of claimed excerpt statements of counsel for interveners and statements of counsel for the bridge company separated from their context. That is a mere pretext for going outside the record. Rule 75 of the Rules of Civil Procedure requires parties to file their respective designations as to what is to be included in the record. Petitioner's counsel knows of this rule since he filed a designation in this cause (R. 727-732), which did not include the claimed excerpt statements. If he had made such designations respondent would naturally have included other portions of the record, which would have fully explained and refuted the implications of the portions quoted by petitioner and shown that the briefs of trustees and Phoenix contained statements completely refuting their present statements. From what has been said on this point by respondent it is obvious that neither the trustees, the Phoenix, the Master nor the court paid any attention to such claimed statements. What the bridge company's counsel stated in oral argument is immaterial since both the court and the Master found that the bridge company was under the dominant control of John A. Thompson, president of Phoenix, and was not making a good faith defense, and would not have to make a good faith defense to the complainant's action had not the interveners intervened. (F.R. 134 and 160.) The present counsel of bridge company were not then counsel for it, but were counsel for interveners.

The case of Thomas v. Brownville, Ft. Ky. Pac. R. Co., 109 U. S. 522, 3 S. Ct. 316, which holds "To the extent of the benefit conferred upon and received by the corporation in the construction of the railroad, the bonds issued in payment thereof are not void, and in suit to foreclose the mortgage by which they are secured, a decree for that amount should be allowed" (quoted from syllabus), was cited by interveners in their brief filed with the District Court on exceptions for different times in support of the proposition that the bonds being fraudulent, recovery could only be had on them on a quantum meruit basis to the extent of actual consideration received by the bridge company. (Respondent's brief filed with trial court 15, 270, 271, 272, 276.) This brief also cited Speers Sand & Clay Works v. American Trust Company (4 C.C.A.), 20 Fed. (2) 233, to the proposition that the validity and consideration of the bonds had to be first determined before there could be any foreclosure. (Same brief 12 and 14.)

Petitioner asserts that counsel for interveners "At Dubuque hearing on February 17, 1937, asserted that the $50,000 mortgage could not possibly be adjudicated in the foreclosure cause, and that any right of Phoenix to the 517 shares of stock was a matter for the state courts to pass upon." This is a deliberate misstatement of the record. Phoenix filed petition for re-hearing and modification of decree on January 23, 1937, in which it asked in the alternative "that the decree be modified so as to withhold from adjudication the question of the validity of the $50,000 mortgage given by the bridge company to petitioner, reserving the right to petitioner to litigate said mortgage in another court if it so desires," and that "The decree be so modified as to reinvest in petitioner 517 shares of Class 'A' stock surrendered in exchange for bonds." (F.R. 222; filing date, F.R. 391.) Interveners filed an answer thereto on the 18th day of February, 1937, in which it was asserted: "That the alleged $50,000 mortgage to the Phoenix Finance Corporation was made and was also released as a part of the fraudulent scheme, plan and conspiracy, and that the 517 shares of capital stock surrendered to the bridge company were so turned over as part of the fraudulent scheme, plan and conspiracy and to fraudulently procure from the bridge company $80,000 of bonds fraudulently issued, and that such transactions were part and parcel of the scheme, plan and conspiracy, and that complainants are not entitled to have the fraudulent mortgage reinstated nor the stock returned. That money or property used to perpetrate a fraud cannot be recovered. * * * That the matters involved in this action have been fully tried and adjudicated and that complainants are not entitled to have anything excepted from the force of such adjudication." (F.R. 398; filing date F.R. 410.) The hearing thereof was had on the 18th day of February, 1938. (F.R. 411.) There was no hearing at Dubuque on the 17th of February as asserted by petitioner. Petitioner Phoenix was asking to have the matters withheld from adjudication and interveners were contending that they had been fully adjudicated, so it is obvious that under such circumstances the interveners' counsel would not make the statement now claimed by petitioner Phoenix, and that the claimed statement is nothing short of a fabrication.

Petitioner at bottom of page 52 and pages 53, 54 and 55 of its brief refers to paragraphs 18 to 39 of its answer entitled sixth defense and counter-claim and seventh defense, stricken by the court. The allegations thereof are a mere repetition of trustees' and Phoenix' assertions in the original trial, as pointed out in Note 3 of this brief, page 16, *supra*. *10.

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*10. Petitioner on pages 54 and 55 of its brief, footnote 29, undertakes to dispute the findings of the court with reference to the control of the bridge company by John A. Thompson and his associates, officers of Phoenix, and in support of its assertions refers back to the first record. The same claims of percentage of stock ownership appear in its petition for re-hearing (F.R. 311), and the citations made for its present assertions are only to its petition for re-hearing and citations made therein to the minutes and stock ledger of the bridge company. Petitioner makes no reference to the evidence before the Master, and the court, showing the proxies procured and held in the names of persons under the control of said John A. Thompson and associates of Phoenix, nor to the evidence showing their control of other directors of the bridge company.

All the present assertions of Phoenix were before the court at the time of the ruling on petition for re-hearing and before the Circuit Court on appeal, and the decision of the trial court and of the appellate court thereon is res judicata of the fact that such control existed and such decision cannot be contravened and collaterally attacked as attempted by Phoenix. They are fully sustained by the record. The record fully sustains the findings.

John W. Shaffer and Vernon W. O'Connor were promoters of the bridge company and John A. Thompson acquired control through them about November 1, 1930. (F.R. 123.) John A. Thompson, with his wife, M. K. Thompson, and his associates, A. B. Wilder and Emory H. English, controlled Phoenix. M. White was John A. Thompson's secretary and an officer of Phoenix. (F.R. 675, 545, 684, 589.) Oscar R. Thorson was employed by Thompson in the work of the bridge company and elected a director at Thompson's suggestion. (F.R. 641, 642.) The only stock held by him was transferred from Thompson & Company. He paid nothing for them and later trans-

ferred them to Phoenix. (F.R. 595, 609.) He always acted with Thompson and never took issue with him. (F.R. 642, 667.)

There were outstanding 3750 shares of voting stock. (F.R. 1485-1489; 122-123.) Thompson was elected president on November 1, 1930. (F.R. 862.)

At the meetings on November 11 and November 26, 1930, 1500 shares were voted by Shaffer, as president of Standard Shares Holding Company, which was controlled by him, and 664 shares by V. M. O'Connor. John A. Thompson presided as president at each of these meetings and his wife acted as secretary. (F.R. 865-871.)

On November 26, 1930, Thompson & Company, a wholly-owned subsidiary of Phoenix (F.R. 545), John A. Thompson and A. B. Wilder held 1834 voting shares, more than one-half of the total voting stock authorized. 1800 shares of this had been issued to Shaffer & Company on that date and immediately transferred to Thompson & Company. (F.R. 596, 1305, 1335.)

At the annual meeting on March 10, 1931, Thompson & Company and John A. Thompson represented 1310 shares, and John A. Thompson held proxies for 375 shares, a total of 1685 shares out of a total number of 2586 shares represented at the meeting, and thus controlled it.

At the stockholders' meeting December 22, 1931, at which the bonds in question were voted, John A. Thompson by proxy and in person, Oscar R. Thorsen by proxy and in person, Mrs. John A. Thompson and M. White, John A. Thompson's secretary, voted 1709 shares, or more than half the stock represented in person and by proxy. (F.R. 591; 955-958.)

At the annual stockholders' meeting on March 8, 1932, out of 2917 votes cast at the election, John A. Thompson, Oscar R. Thorsen and one H. T. Wagner, as joint proxies, together with John A. Thompson and Wagner individually, cast 1781 votes out of a total of 2917 and controlled the election of the board of directors. (F.R. 986-989.)

At the stockholders' meeting held on July 8, 1933, at which there were present in person 964 shares, Thorsen and Thompson held proxies for 1283 shares, which were recognized. There were 1415 other proxies which, through Thompson's control of the meeting, were not recognized nor permitted to vote. On the final vote for directors there were 1878 cast, of which at least 1155 were controlled by Phoenix and Thorsen. (F.R. 1033.)

FIRST APPEAL.

The trustees and Phoenix Finance Corporation, compiainants, appealed from the opinion, findings of fact and final decree and from the court's ruling on motions to vacate the decree and the court's ruling on petition for rehearing to the Eighth Circuit Court of Appeals, asserting all the claims now attempted to be asserted by Phoenix Finance Corporation in the trial court on hearing of supplemental and ancillary bill and on this appeal. (Assignments of error, first appeal, trustees' assignments, F.R. 502-507; Phoenix Finance Corporation's assignments numbers 1 to 65, F.R. 508-528.)

The Circuit Court of Appeals in its opinion concluded that the record supported the lower court's findings with respect to lack of consideration for the $177,600.00 of bonds issued to Phoenix. (98 Fed. (2) 416, at 427; F.R. 1689-1709.)

Proceedings on Supplemental and Ancillary Bill After Issue Joined to Trial.

On January 23, 1940, Phoenix served notice to take the depositions of George E. Preuss, Edgar S. Gage and Lee J. Skoner (R. 174). The bridge company then filed a motion under rule 30-B, Rules of Civil Procedure, for an order that the depositions of the witnesses named be not taken upon grounds which appear in the record (R. 175-177). On February 2, 1940, Phoenix filed a resistance to the motions of the bridge company with certain schedules attached, setting out proposed testimony (R. 192-223).

As to the schedule entitled "George E. Preuss Testimony" (R. 217-218), it was asserted he would testify that he was an accountant and that he assisted Lee J.

Skoner to make a report for Phoenix and would testify to like effect as Skoner. His *ex parte* alleged work and report claimed to have been made are no part of the record in this cause. He was not present at the trial, nor at the hearing of exceptions, nor at the hearing of the petition for rehearing, and the proposed testimony was wholly incompetent, irrelevant and immaterial and the proposed witness incompetent to contravene the record.

There was also attached schedule entitled "Testimony of Edgar S. Gage" (R. 218). He was a witness on the original trial and subject to examination by Phoenix (F.R. 561). He made an affidavit for Phoenix, which was attached to its petition for rehearing, in which he made like statements to those contained in the schedule and on which he sought to show consideration for the bonds, which the Master and the court found did not exist (F.R. 271-276). Full reply to his affidavit was made in the bridge company and intervener's answer to petition for rehearing and affidavits thereto attached. (F.R. 394-398 and especially 397-398; 399-410, especially 408-410, inclusive.) The court had overruled the petition for rehearing and thereby found that his statements were not well founded. His proposed testimony was incompetent, irrelevant and immaterial, and he was an incompetent witness to contravene the record. (F.R. 411-413; Master's findings, F.R. 115-138; court's findings, F.R. 179-202.)

There was also attached a schedule entitled "testimony of Lee J. Skoner" (R. 221). He made an affidavit, which was attached to Phoenix Finance Corporation's petition for rehearing in this cause, wherein he made like statements as those contained in the schedule of proposed testimony, as to claimed consideration and underlying considerations for the bonds and with respect

to stock which the court found did not exist and were not supported by the record (F.R. 308-324; findings of fact, F.R. 179-202, and court's opinion, F.R. 156-179, especially 177), where the court states: "Touching this issue the Ernst & Ernst report is nothing short of *petitio principii,* the accountants in the report simply attempt to prove the truthfulness of the books and accounts by resorting to the books and accounts themselves." The proposed testimony was incompetent, irrelevant and immaterial and the witness was incompetent to contravene the record.

On February 6, 1940, the hearing on the motion was had and the court made its order that the depositions in question be not taken (R. 223-224). *11.

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*11. At the hearing the following proceedings took place:

"The Court: As I understand counsel and the resistance, including the tender, there is an offer to prove by these accountants, Chicago persons, matters bearing upon the issues that were presented and tried in the original trial of the case some years ago, and this upon the theory that the Phoenix Finance Corporation was not such a party to that case that it is bound by the decree entered therein and affirmed by the Court of Appeals. Is my assumption correct?

"Mr. Schenk: Not entirely. Our position is that the former decree did not preclude the Phoenix Finance Corporation in respect to the actions now sought to be joined, which have been brought in the State of Delaware.

"The Court: I may confine my statement to those items because really those are the only items in issue in this supplemental complaint.

"Mr. Schenk: May I add to my statement, 'Nor was there an adjudication cancelling the $50,000 mortgage referred to in the supplemental and ancillary bill'?

On February 10, 1940, Phoenix Finance Corporation filed notices for the taking of depositions of John A. Thompson and of Albert Penn (R. 224-226). The bridge company filed a motion for an order that these depositions be not taken and in the alternative that the scope of the examination be limited to specific matters considered competent, relevant and material by the court and that the court order whether such examination be written or oral interrogatories, and that the cause proceed to the hearing on permanent injunction on grounds stated in the record (R. 226-229).

"The Court: Yes, I think I understand counsel's contention.

"The ruling of the court will be that the only issues material to be considered in this supplemental complaint is the matter of the identity of the subjects presented for litigation in the Delaware suits described in the supplemental complaint with the items considered on the original trial, and which it was contended in that case by the plaintiff entered into and were refunded by the issue of bonds aggregating $200,000.00; that the identity of those items must be determined by the record in the original trial, and the court being of the opinion that the Phoenix Finance Corporation is in all respects bound by that decree because of its presence on the record in that case, and because of its succession to the previous corporation, all of whose acts and conduct were shown to have been ratified by the Phoenix Finance Corporation. The ruling herein must be in favor of the two motions.

"The motions will each be sustained, and an order granted finding and directing that the depositions in question will not be material; that the witnesses, whose testimony is noticed to be taken, are incompetent to contravene or overcome the record of the original trial." (R. 189-190.)

On February 29, 1940, Phoenix filed a resistance to this motion (R. 238-250). After hearing on March 5, 1940, an order was made by the court that the depositions of these witnesses be not taken (R. 256-257). *12, *13.

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*12. At the hearing on the motion, among others, the following proceedings occurred:

"The Court: But as in the consideration of the previous motion it is your contention that you are entitled to make the proof tendered because Phoenix was not bound by the final decree in the trial of the case originally?

"Mr. Schenk: It is our contention that Phoenix was not bound in respect to the matters which are now raised in suits started in Delaware, or in respect to the $50,000 mortgage referred to in the supplemental and ancillary bill. In other words we say that upon Mr. Ontjes' application as set forth in the supplemental and ancillary bill we are entitled to make the showing which we now tender, and the testimony and exhibits referred to in our resistance.

"The Court: That is all, gentlemen?

"Mr. Ontjes: That is all, Your Honor.

"The Court: The matter will be submitted." (R. 255.)

On the 5th day of March, 1940, the court entered formal order that the depositions of John A. Thompson and Albert Penn be not taken. The court stated:

"And the court having examined said motion and resistance and having heard statements of counsel from which it appears it is proposed to prove by said John A. Thompson and Albert Penn matters bearing upon the issues that were presented and tried in this cause some years ago;

"The only material issues to be considered in the supplemental complaint is the matter of the identity of the subjects presented for litigation in the Delaware courts, and the mortgage described in the supplemental complaint, with the items considered and determined in this cause, and the identity of these items must be determined from the records. That the depositions in question would not be material; that the witnesses whose testimony is noticed to be taken are incompetent to contravene or overcome the record in this case.

"It is, therefore, ordered that the depositions of John A. Thompson and Albert Penn shall not be taken." (R. 257.)

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*13. Said John A. Thompson and Albert Penn appeared at the trial and their proposed testimony is discussed infra.

Trial Supplemental Proceedings.

On March 11, 1940, trial was had on the supplemental and ancillary bill and answer thereto.

The Bridge Company's Evidence.

The respondent bridge company asked the court to take judicial notice of all the pleadings filed in the case, all depositions and evidence taken, the transcripts of such evidence, the Master's report, the exceptions filed to such report, the opinion, order and decree of the trial court made with respect to the exceptions to the Master's report, the final decree, the application or petition for rehearing filed by Phoenix and supplemental opinions and orders of the trial court with respect to that, and generally, without exception, all the records, papers and files in the cause. It also offered all these matters in evidence and asked that the court take judicial notice of the opinion of the Circuit Court of Appeals as reported in 98 Fed. (2) 416, and of the mandate of the Circuit Court of Appeals (R. 260).

Respondent also offered the following exhibits to show the identity of the matters involved in the Delaware actions with the matters involved in this cause:

Exhibit "SC-1," certified and exemplified copy of the summons and declaration in cause No. 39 described in paragraph 7-a of the supplemental and ancillary bill (R. 266; 294 to 301; 5 and 6).

Exhibit "SC-2," certified and exemplified copy of bill of complaint filed in the Chancery Court of Delaware, described in paragraph 7-b of the supplemental and ancillary bill (R. 267 and 301 to 307 and R. 6).

Exhibit "SC-3," certified and exemplified copy of the Delaware court of summons, affidavit of demand and writ, together with Narr. in cause No. 65, described in paragraph 7-c of the supplemental and ancillary bill as amended (R. 267; R. 307-319; R. 6-7; R. 98).

Exhibit "SC-4," certified and exemplified copy of Delaware suit, described in paragraph 7-d of the supplemental and ancillary bill as amended. (R. 267-268; R. 320 to 339; R. 7; R. 98-99.)

Exhibit "SC-5," certified and exemplified copy of Delaware court of summons, affidavit of demand and writ, Narr. declaration filed in cause No. 79, of the action described in paragraph 7-e of the supplemental and ancillary bill as amended (R. 268; 340 to 373; 7, 99).

Exhibits "SC-6" and "SC-7" to show the identity of the mortgage described in paragraph 11 of the supplemental and ancillary bill as amended and its recording in Allamakee County, Iowa, and its recording in Crawford County, Wisconsin (R. 268-269 and 374-385, 10).

And in support of the allegations of paragraph 9 of the ancillary bill (R. 8) respondent offered in evidence certain statements claimed by Phoenix to have been made by John A. Thompson at the meeting referred to in that paragraph contained in its resistance to the motion that depositions be not taken (R. 269-270, 201, 204). To prove the allegations of paragraph 10 of the bill (R. 9) respondent offered in evidence letter of John A. Thompson marked Exhibit "A," dated November 23, 1938, attached to resistance of Phoenix to the motion that depositions be not taken and Exhibit "B," letter of John A. Thompson, dated June 12, 1939, attached to the same resistance (R. 270-271, 214-217). Said letters containing the identical statements alleged in said paragraph.

Phoenix Finance Corporation's Evidence.

Petitioner Phoenix offered in evidence Exhibits "SC-101," "SC-102," "SC-103," "SC-104" and "SC-105," complete exemplified copies of the records and docket entries in the same proceedings referred to in the respondent's offers, "SC-1," "SC-2," "SC-3," "SC-4" and "SC-5" (R. 275).

Phoenix then proposed to call John A. Thompson as a witness (R. 276) with respect to the matters stated in the schedule entitled "testimony of John A. Thompson" attached to its resistance to the motion that depositions be not taken (R. 205-217).

John A. Thompson's deposition had been taken prior to the original trial, and he refused to answer numerous questions (F.R. 414-500). He was a witness on the part of Phoenix on the trial in this cause. (F.R. 538-561, 562-563, 633-637, 651-653, 673-685, 691-692.) He made affidavits for Phoenix, which are attached to its petition for rehearing (F.R. 230-231, 355-364). It was asserted that he would testify as to the Delaware suits described in the supplemental and ancillary bill as amended, with respect to which his testimony would have been wholly immaterial and incompetent. Certified, exemplified records thereof, which were offered in evidence by appellee were the best evidence thereof. It was asserted that he would testify with respect to alleged and pretended $50,000 mortgage and $97,000 of bonds and other items, all of which were found fraudulent and without consideration by the trial court and the Circuit Court of Appeals. (Findings of fact, F.R. 179-202; opinion of Circuit Court of Appeals, 98 Fed. (2) 416; F.R. 1689.) His proposed testimony was incompetent to contravene the record. It was asserted that he would testify with respect to copies of

letters written by him, dated November 23, 1938, and June 12, 1939, referred to in paragraph 10 of the supplemental and ancillary bill as Exhibits A and B thereto attached. Phoenix' answer substantially admits the allegations of said paragraph and the letters were offered in evidence by appellee on hearing on permanent injunction to prove the statements alleged in the supplemental and ancillary bill (R. 209, 9, 150-151).

It was asserted that he would testify with respect to the effect of the decree of the trial court and of the Circuit Court of Appeals relating to the action in Delaware involving alleged toll tickets, referred to in paragraph 7(f) of the supplemental and ancillary bill. His testimony was incompetent; the record was the best evidence; and furthermore, the court did not grant an injunction with respect to that action.

It was asserted that he would testify to matters in regard to the 517 shares of bridge company stock. All of the matters relating thereto were fully determined by the decisions of the trial court and of the Circuit Court of Appeals; and his testimony was incompetent to contravene the record.

It was asserted that he would deny that he made an assertion on or about the 6th day of December, 1938, as alleged in paragraph 9 of the supplemental and ancillary bill. That paragraph contains the statement that he asserted about the 6th day of December, 1938, that the litigation involved in this action was not ended, and would not be ended for a good many years (R. 8, 150). That was immaterial because appellee on the trial did not offer evidence of this particular statement, and because it was admitted in the answer of Phoenix that on the 8th day of

July, 1939, John A. Thompson did say that there were six cases pending in Delaware that would be carried on in the course of the next few months (R. 150).

And it is also in evidence from Phoenix' own resistance that he made the statements above quoted from the excerpt of transcript attached to the Penn schedule of Phoenix resistance, which are in substance what is alleged in the bill (R. 204).

It further offered to show Phoenix had complied with the order of April 24, 1934, for the production of books and papers, which the court in its ruling on petition for rehearing found that Phoenix did not produce; and to testify to the statements contained in his affidavits filed in connection with the petition for rehearing (R. 276-277). *14.

And to show what he claims he was told by Phoenix' counsel and to identify an alleged letter of Phoenix' counsel to the Special Master; and to testify as to claimed consideration for the $50,000 mortgage (R. 277-278), which was found fraudulent, wholly without consideration and void by the court (F.R. 191-192), and to have him identify certain checks (F.R. 278), one of $35,000 and one of

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*14. The books and records were never produced, and the court's finding and ruling on petition for re-hearing was fully sustained by the record and affidavits in resistance to said petition. (F.R. 613-616; 552; 675; folio 977; also see F.R. bottom 635, top 636; also see John A. Thompson deposition taken May, 1934, F.R. 414-500 and particularly 425-427; 434; 435, interrogatories 200-202; see affidavits; see answer to petition for re-hearing and affidavits attached thereto, F.R. 394-410, especially bottom 396 and top 397.) In the former appeal of Phoenix Finance Corporation the Phoenix assigned as alleged error the trial court's ruling on petition for re-hearing. (Assignments, 60-65; F.R. 527-528; appellant's former brief, 19, paragraph 35, and bottom 93 to 96; bridge company's brief, 123; this court affirmed the ruling.)

$15,000, with respect to which he testified on the former trial, which the court found were drawn by Phoenix, endorsed by the bridge company without consideration and returned to Phoenix, issued in connection with the making of false entries on the books of the bridge company (F.R. 551 552, 553, top 554; court's opinion, F.R. 173; court's findings petition for appeal, F R. 51; trustees' assignment of error 13, F.R. 505; Phoenix' assignments of error 11(b), F.R. 511, 31, F.R. 516; 43, F.R. 522; opinion Circuit Court of Appeals, F.R. 1689 at 1702, 1705, 1707) and to identify minutes of directors' meetings of the bridge company dated March 11, 1931, November 10, 1931, December 22, 1931, March 7, 1932; minutes of stockholders' meetings dated March 10, 1931, December 22, 1932 (R. 279), all of which were offered in evidence on the original trial, including minutes of stockholders' meeting of December 22, 1931, which through error in present record is referred to as December 22, 1932, on which latter date, the record shows, there was no meeting (F.R. 902 905; 939 945; 962 969; 979 986; 886 901; 946 959; 959 1027), and to identify Exhibit "SC 107," purported copy of letter dated March 15, 1932, from Iowa Wisconsin Bridge Company to Phoenix Finance System, signed by Oscar R. Thorson (R. 280 and 585 586), and to identify Exhibit "SC 108," purported copy of letter dated March 15, 1932, from Phoenix Finance System to the Iowa Wisconsin Bridge Company (R. 280 and 587 588), and to identify Exhibit "SC 109," purported copy of letter dated March 11, 1931, Iowa Wisconsin Bridge Company to Standard

Shares Holding Company, signed by Oscar R. Thorson (R. 299 and 300-303). *15.

And to show that in connection with the purported $70,000 mortgage dated March 10, 1931, an alleged further advancement by Phoenix Finance System, Inc., for the account of the bridge company in the sum of $9,000.00 under date December 10, 1931, was used to pay a lienor on the bridge company, Kramer & Hogg, and that the mortgage provided for subsequent advancements, and was security for that, and that the mortgage was for $59,000 instead of $70,000, as it reads upon the face thereof (R. 300-302). *16.

*15. Said purported letters of the bridge company purport to have been written in 1932 and 1931 while the bridge company was dominated and controlled by John A. Thompson, president of the Phoenix Finance Corporation, and its predecessor, and purport to be signed by Oscar R. Thorson, his employee. (Master's Report, F.R. 123, 163, 175.) It was not proposed to show any reason or explanation why the purported letters, if deemed material, by the Phoenix, were not offered in evidence on the original trial.

*16. The purported resolution passed at a directors' meeting on March 10, 1931, where only Thompson-controlled directors were present, only provided for a $50,000 mortgage. (F.R. 902-904; court's finding of fact No. 28, F.R. 191-192.) Phoenix in its exception number five to the Master's report, partially quoted above at page 44, asserted as consideration for $37,000 of bonds the purported mortgage of $50,000 with interest thereon, and as one of the separate and additional items of claimed consideration the above mentioned item. (F.R. Supp. 26-27.) And said Phoenix also asserted in said exception that said mortgage was an open one; that it covered future advances, quoting the same alleged provision as is quoted in appellant Phoenix Finance Corporation's present brief and argument at page 27. (F.R. Supp. 32.) The court found that the mortgage was wholly without consideration, fraudulent and void (F.R. 192), which was affirmed by the Circuit Court of Appeals. Phoenix' answer to the supplemental and ancillary bill contained no such allegation, not even the part thereof stricken by the court. (R. 147-167.)

And to show that Thompson, Phoenix Finance Corporation, Phoenix Finance System, Inc., Thompson & Company, and associates or affiliated companies did not control the bridge company or its board of directors. *17.

And to identify an alleged *ex parte* report of Ernst & Ernst under date of January 17, 1940 (R. 282). *18.

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*17. The Master found that they did control the bridge company and its board of directors. (F.R. 129.) To this finding Phoenix filed exceptions. (Phoenix' exceptions 1 and 2, F.R. Supp. 17-20.) The court overruled the exceptions and found that the bridge company was thus controlled. (F.R. 179-180; court's finding No. 20, F.R. 188, affirmed by this court.) See also note 10, p. 68, supra.

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*18. Phoenix attached a like ex parte report by Ernest & Ernest to its exceptions to the Master's report, made after the Master's report, of an alleged examination of the books of the bridge company and Standard Shares Holding Company, and certain other documents which were not in evidence. (F.R. Supp. 23.) This report, however, was not printed, but the preceding figures (F.R. Supp. 22-23) show a claim by Phoenix at that time that it had paid $112,379.03. With respect to this report, the trial court in its opinion, among other things, said:

> "This issue was clearly and sharply drawn whether the books and accounts of the bridge company, kept under the supervision of the Standard Shares Holding Company and Phoenix Finance Corporation, spoke the truth, or whether they were false and largely fictitious. Touching this issue, the Ernst & Ernst report is nothing short of a petitio principii. The accounts in the report simply attempt to prove the truthfulness of the books and accounts by resort to the books and accounts themselves." (F.R. 176-177.)

Phoenix in its petition for re-hearing by affidavit of Lee J. Skoner, employee of Ernst & Ernst referred to above, presented figures claimed to represent advances by Phoenix to the bridge company, Phoenix claiming by such affidavit advancements to the bridge company of $95,043.71. (F.R. 308-324.) The petition for re-hearing was overruled on the 4th day of March, 1937. (F.R. 411-413.) Phoenix assigned error upon the trial court's denial of the petition for rehearing. (F.R. 527-528.)

The Circuit Court of Appeals in its opinion on first appeal (F.R. 1689, at 1705) said:

And to show by him what is involved in the case referred to in paragraph 7(b) of the supplemental and ancillary bill and shown by certified exemplified Exhibit "SC-2" of the Delaware court with respect to the 517 shares of stock (R. 283). *19.

And to deny certain findings of the court on previous trial (R. 284-285) and to dispute the findings of the court with respect to items of $10,000 to Industrial Contracting Company and $11,262.71 to McClintic-Marshall, totaling $21,262.71, and the court's finding with respect to the succession of Phoenix Finance Corporation to Phoenix Finance System, Inc. (R. 285-286; court's findings numbers 32, 33 and 34, F.R. 194-196; and the court's findings numbers forty and forty-one, F.R. 201-202; affirmed by the Circuit Court of Appeals, 98 Fed. (2) 416, at 425; F.R. 1687, at 1702, 1690.)

The entire foregoing offer of testimony was objected to by respondent as being incompetent, irrelevant and immaterial, and that the witness proposed to be offered was not competent, contravening the record in this cause.

"It is argued with great earnestness by appellants that notwithstanding appearances the bridge cost $815,146.85, of which only $653,659.23 were paid for by outstanding stock, and that the difference of $161,487.62 was furnished by Phoenix; that the bridge company had no other source of income. This would be a formidable argument except for the fact that the bookkeeping by which the result is reached is set out and it does not bear analysis. The figures are confuted by the facts."

In their answer to the supplemental and ancillary bill of complaint, now three years later Phoenix proposed to present still another alleged ex parte report, setting up a retabulation of the same claims.

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*19. The exhibit was the best evidence and his proposed testimony on the subject would have been wholly incompetent and secondary.

The objection was sustained, and the offer of proof denied (R. 286-287).

Phoenix offered in evidence its Exhibit "SC-106," purported letter from its counsel, Rex Fowler, to Mr. J. W. Kindig, dated July 25, 1935. Respondent objected to it as being incompetent, irrelevant and immaterial, not part of the record in this case and that it could not be added then as part of the record (R. 287). The objection was sustained.

Petitioner offered in evidence the minutes of the directors' meetings of the bridge company of March 11, 1931, November 10, 1931, December 22, 1931, and March 7, 1932, and minutes of stockholders' meetings of March 10, 1931, December 22, 1932, to which respondent objected as immaterial, as new offers made, and that the minutes were already in the record before the court. The court sustained the objection (R. 287).

Petitioner offered in evidence its Exhibit "SC-107," purported letter from Iowa-Wisconsin Bridge Company to Phoenix Finance System, Inc., dated March 15, 1932, to which respondent objected as incompetent, irrelevant and immaterial, attempted offer of new evidence, which was no part of the record on the former trial of this case. The court sustained the objection (R. 287).

Petitioner offered its Exhibit "SC-108," purported letter of Phoenix Finance System, Inc., to the bridge company, to which respondent objected as incompetent, irrelevant and immaterial, no bearing on the issues there tendered and not a part of the record in the cause. The objection was sustained by the court (R. 287-288).

Petitioner offered in evidence its Exhibit "SC-109," purported letter of bridge company to Standard Shares Holding Company, dated March 11, 1931, to which respondent objected as incompetent, irrelevant and immaterial, no part of the record in this cause, and could not stand as new and independent evidence outside the record. The objection was sustained by the court (R. 288).

Petitioner offered in evidence its Exhibit "SC-110," purported transcript of stockholders' meeting of July 8, 1939, and its Exhibit "SC-111," purported transcript of stockholders' meeting of December 6, 1938, to which respondent objected; and the objections were sustained and petitioner did not include the proposed exhibits in its designation of the record (R. 288-289).

Petitioner offered in evidence its Exhibit "SC-112," purported photostat copy of check dated 3-11-31, Phoenix Finance System, Inc., to Iowa-Wisconsin Bridge Company, and its Exhibit "SC-113," purported photostat copy of check dated 3-11-31, Phoenix to bridge company, to which respondent objected as incompetent, irrelevant and immaterial, repetition of the record previously made. The court sustained the objection (R. 289-290).

Petitioner offered to show by Albert Penn as a witness (R. 291) the matters mentioned in the schedule entitled "Albert Penn Testimony," attached to the resistance to the motion that depositions be not taken (R. 197-205). Albert Penn was not present at the original trial of this cause, nor at the hearing on exceptions to the Master's report, nor at the hearing of petition for rehearing, but he made an affidavit for Phoenix in support of said petition, in which he asserted substantially the same things as were asserted in the schedule (F.R. 302-304).

In the schedule it was asserted that he would testify that the bridge company is indebted to Phoenix and with respect to items which were involved in previous trial, including the pretended mortgage, all of which were determined to be fraudulent and without consideration in the prior decisions of the trial court and of the Circuit Court of Appeals (findings of fact F.R. 172-202; opinion of the Circuit Court of Appeals, 98 Fed (2) 416; F.R. 1689). All of such proposed testimony was in contravention of the record. No statement of diligence was made as to why this proposed witness, who was a director of Phoenix, was not called as a witness in the original trial if he claimed to know anything. And it was asserted in the schedule that the witness would testify to the correctness of the excerpt of the shorthand report of stockholders' meeting held on July 8, 1939, attached to the schedule; but that was immaterial because paragraph 9 of the supplemental and ancillary bill (R. 8) alleges that on July 8, 1939, as president of Phoenix, said Thompson further asserted that one case had been tried in the courts of Delaware in June, 1939; that the things, referring to the matters involved in this case, were not over, and that there were six cases in the State of Delaware that would be carried on in the courts in the next few months (R. 8). The Phoenix' answer admits that on July 8, 1939, John A. Thompson did say that there were six cases pending in the State of Delaware that would be carried on in the course of the next few months; and the excerpt contains the statement: "Mr. Ontjes has stated here and he stated in the December meeting that the litigation between the Phoenix and the bridge company was all over. Now, in the first place, there never was any litigation between the Phoenix and the bridge company" (R. 201). And the statement—"Now this indebtedness can be properly pre-

sented and evidence can be put down in the Delaware court. This is now being done. There are six cases down there now that will be carried on through the courts in the next few months, the one that I have just described was heard—it is all finished except the decision of the court, which they promised by the first of August and the five others to follow" (R. 204).

That is in substance what the supplemental and ancillary bill alleges, and the other statements contained in the excerpt are the mere self-serving declarations of Mr. Thompson of Phoenix. The above quoted statements were offered in evidence at the hearing on permanent injunction by respondent, bridge company (R. 269-270).

The respondent objected to the foregoing offer of testimony as being incompetent, irrelevant and immaterial and the witness incompetent to contravene the record. The objection was sustained by the court (R. 291).

Petitioner offered to call Emory H. English as a witness to testify with respect to compliance by Phoenix Finance Corporation with the order of the court to produce books and records pertaining to its business with the Iowa-Wisconsin Bridge Company, to which respondent objected as follows (R. 221-223): "Objected to as being incompetent, irrelevant and immaterial and Mr. English is not competent to contravene the record of the previous trial of this cause; his testimony is in the record; he was examined and cross examined and any statement by him would be a mere attempt to vary the record" (R. 613-616). The Court: "The objection will be sustained and the offer will be denied" (R. 291).

The petition offered to call Lee J. Skoner as a witness (R. 291) to testify to the matters stated in the sched-

ule entiled "Testimony of Lee J. Skoner," attached to the resistance of Phoenix, and to identify purported report of Ernst & Ernst of an examination of the affairs of the Iowa-Wisconsin Bridge Company under date of January 17, 1940, which was marked appellant's Exhibit "SC-114" and in connection with such offer petitioner offered said exhibit, to which respondent objected: "We object to the offer of the testimony of Mr. Skoner as being incompetent, irrelevant and immaterial. Mr. Skoner is not competent to vary or contradict the record in this cause, or to contravene it in any way. Furthermore, Mr. Skoner or the Phoenix Finance Corporation in the petition for rehearing presented an affidavit claiming to be the same Mr. Skoner with respect to some of these matters and passed upon by the court." The Court: "The objection sustained and the offer is denied in its entirety" (R. 292, see p. 72, *supra;* see also note 18, *supra*).

The cause was submitted (R. 293).

The court made findings of fact and conclusions of law, which were filed March 23, 1940 (R. 700-717).

Findings of Fact and Conclusions of Law of the District Court.

Finding Number One (R. 701-704):

The record sustaining the court's finding number one is set forth in the statement of the case, this brief, pages 25 to 58.

Findings Numbers Two and Two-A (R. 704):

The court's findings numbers two and two-A are sustained by the record, pages 1 and 2; 101-141; 237.

Finding Number Three (R. 705):

The facts sustaining finding number three are set forth in the statement of the case, pages 25 to 58.

Finding Number Four (R. 705):

Admitted in the answer. See bill, par. 2, R. 3; answer, par. 2, (R. 147):

Finding Number Five (R. 705):

Admitted in substance in the answer. See bill, par. 3. p. 4, R. 4; answer, par. 3, 147-148; and also in support see F.R. 206-223; 224-391).

Finding Number Six (R. 705):

Admitted in the answer. See bill, par. 4, p. 4; answer, par. 4, p. 148.

Finding Number Seven (R. 706):

See ancillary bill, par. 5, R. 4; defendant's answer, par. 5, R. 148, "admits all allegations concerning date of commencement, depositions, transcripts, exhibits, and trial before Master except the length thereof, which appear in paragraph 5 prior to the allegation concerning work on exceptions settling record and appeal, and as to this allegation Phoenix states that it is without knowledge or information sufficient to form a belief as to the truth thereof. For answering, denies each and every allegation of paragraph 5 not herein expressly admitted." The finding is amply sustained by the judicial knowledge of the trial court as shown by the voluminous record in this case.

Finding Number Eight (R. 706):

"That notwithstanding the final adjudication and order of the District Court of the United States for the Northern District of Iowa, the complainant, Phoenix Finance Corporation is disregarding said adjudication and order, and for the purpose of attempting to invalidate and nullify the lawful decree and order of this court and for the purpose of depriving the defendant of the fruits of said adjudication and for the purpose of harassing, vexing and annoying and destroying the business of the defendant, has commenced and is prosecuting and is about to prosecute in the State of Delaware numerous and divers suits and actions involving the same matters fully and finally determined by this court, and has further and in contempt of this court filed for record and recorded the $50,000 mortgage hereinbefore and hereinafter referred to held by this court to be fraudulent and invalid."

This finding is amply sustained by the court's judicial knowledge of the prior record and by the facts produced in this record with respect to the Delaware actions and the recording of said $50,000 mortgage, as set forth in the above statement of the case (pages 3 to 88) *supra*.

Finding Number Nine:

Finding 9-A $2,000 and $3,125 Notes.

"a. Said Phoenix Finance Corporation filed an action entitled Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware, versus the Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware in the Superior Court of the State of Delaware in and for New Castle County, being

case No. 39, November Term, 1936, the summons of said action being dated September 29, 1938, and the alleged cause of action being based on two certain alleged promissory notes, one of $2,000 dated December 15, 1932, and one of $3,125 dated January 20, 1933, which were involved in the above entitled cause and the adjudication thereof; that in this cause it was claimed that said notes and the alleged considerations thereof formed part of the consideration for the issuance of $20,100 of the bonds involved in this action. That this court found that the said bonds were fraudulently issued and wholly without consideration and were more than offset by indebtedness of Phoenix Finance Corporation and its predecessor Phoenix Finance System, Inc., to this defendant, Iowa-Wisconsin Bridge Company. That in said cause in Delaware the defendant, Iowa-Wisconsin Bridge Company interposed the defense of *res judicata* and other defenses, such as want of consideration. That said cause was tried on the issue raised by the plea of *res judicata*, but has not yet been determined by the Delaware court" (R., p. 707).

See paragraph 7(a) of the supplemental and ancillary bill (R., pp. 5-6), and Phoenix answer, par. 7(a), (R., p. 148) which "admits that it filed the action described in paragraph 7(a), based on two promissory notes, one of $2,000 and one of $3,125; admits that this court set forth in its decree that the mortgage and bonds sought to be foreclosed were fraudulently issued and that the bonds were without valid consideration, with the exception of certain bonds aggregating $15,000," etc.

The suit referred to in this finding involves one note for $2,000 and one note for $3,125 (R., pp. 5-6; Ex. SC-1, R., pp. 294-301), which were part of an alleged indebtedness of $17,735.19 to Phoenix Finance Corporation se-

cured by $20,100 of bonds involved in this case. On the 17th day of July, 1933, the Thompson-Phoenix controlled board of the bridge company passed a resolution that $20,100 of Class B bonds of the bridge company be pledged as collateral to a note of $12,110.19 to Phoenix and three other notes in the amount of $5,625 to Phoenix (the latter notes being one of $500; one of $3,125 and one of $2,000). (F.R., pp. 1027-1029, Ex. No. 28 HEB shows issuance of collateral of said bonds to said notes (F.R., p. 829; pp. 562 and 563). The $200,000 of bonds involved in the action in this court were $100,000 Class A bonds and $100,000 Class B bonds. The $12,110.19 note and the $500 note are involved in another Delaware suit, hereinafter referred to in paragraph (c).

The master found as to the specific grounds which were collateral for the notes above mentioned involved in the Delaware suits (Finding 10):

"(i) That the remaining bonds, approximating $19,000 to $20,000 were issued to the Phoenix Finance Corporation as security for a note of $3,125.00 given in part to secure the payment of that amount made by the said Phoenix Corporation on behalf of the bridge company to pay taxes of the bridge company in the state of Wisconsin. That to the extent of the principal of, and interest on, the said note only the said bonds are valid, but to no other extent are these particular bonds valid."

"(k) That of the bonds above named issued to Phoenix Finance Corporation to secure the said note of $3,125.00 the amount of bonds not necessary for such security, approximating the sum of $16,975 are without consideration, obtained by a fraud and invalid" (F.R., p. 133 to p. 134).

The master in his conclusions of law stated:

"Paragraph 5. That under the facts above found, it is apparent as a matter of law that the complainants did not furnish the necessary proof in sustaining the validity of the bonds, except the bonds specifically named in paragraph 10 of the findings of fact, and the Phoenix Finance showing made in the first instance by the complainants has been overcome by evidence of the defendant and interveners excepting as to those bonds especially named as having consideration in paragraph 10 of the findings of fact, and all the said bonds not named in said paragraph 10 of the findings of fact as having a consideration, are illegal and void because they were issued fraudulently."

"Paragraph 6. That excluding the said bonds specifically mentioned in paragraph 10 of the findings of fact as having consideration, approximately $112,375 of the balance of said bonds issued to the said Thompson and his companies, not in exchange for stock but on a fraudulently alleged consideration purporting to appear on the books of the Iowa-Wisconsin Bridge Company were issued without legal consideration and are therefore void" (F.R., p. 136).

The interveners and defendant filed exceptions to the master's report (F.R., p. 148), exception 8 being:

"To so much of the fifth conclusion of law as makes the following exception to such conclusion, to-wit: 'except the bonds specifically named in paragraph 10 of the findings of fact' and to the seventh conclusion of law insofar as it makes exception to such conclusion and to so much of the eleventh conclusion of law as makes exception in said paragraph to said conclusions as follows, to-wit: 'Exception as hereinbefore stated' and 'exception that the

bonds named in paragraph 10 in the findings of fact as having been issued in good faith are valid and may be enforced accordingly' " (F.R., p. 153 to and inc. p. 155 and 224 to 226).

Exception No. 8 and intervener's exceptions 9 and 11 were sustained by the court in its final decree (F.R., p. 203).

The complainants filed exception (F.R., Supp., pp. 10 and 11).

Complainant, Phoenix Finance Corporation, filed full and complete exceptions to the master's report redefining with particularity the issues involved (F.R., Supp., p. 14 to and including p. 58), and with particularity excepted with respect to the notes now in issue as follows, beginning on page 48 of the supplemental transcript of record:

"Exception No. 6. It excepts to fact finding 10 (i) and (k), wherein the master refers to bonds of '$19,000 to $20,000' and finds them to be a valid pledge for principal and interest on a note of $3,125.00 from the bridge company to the Phoenix Finance Corporation, but invalid to the extent of $16,975 as without consideration and fraudulent.

"This finding is erroneous for the following reasons:"

Then follows the statement appearing at pages 46 to 47, inclusive, of this brief, *supra*.

It will be noted that in the foregoing exception Phoenix not only asserts the notes as claimed consideration for the bonds, but asserts claimed original underlying considerations of said notes as consideration for the issuance of the bonds. As showing that the notes described

in paragraphs (a) and (c) of said exception quoted above are the same as those involved in the Delaware action described in the above finding of the court 9(a), see Exhibit 8C-1, R., pp. 294-301, particularly R., pp. 298-299. As showing that the notes described in paragraphs (b) and (d) of said exception above quoted are the same as those involved in the Delaware action described in the court's finding number 9(c) hereinafter refered to, see Exhibit 8C-3, R., pp. 307-319.

The statements of petitioner on page 27 of its brief "That there was no finding of fact by the master with respect to the $2,000 note" and "The district court made no reference to the $2,000 note in its finding and opinion" are not supported by the record.

And the statement of petitioner on page 31 of its brief "There is no finding or conclusion either of the master or of the district court in the foreclosure case which is specifically and directly referable to the two notes for $12,110.19 and $500, respectively, for which Phoenix is suing the bridge company in Delaware in this action" is without foundation or merit. We call attention to this at this time because what is said above and what is said following also applies to the court's finding number 9(c) dealing with the last mentioned notes and action hereinafter further referred to.

The said Phoenix exception continues:

2.

"The master makes no reference to note herein designated (a) *for $2,000.00, but disallows it without stated reason or reference, as being without consideration and fraudulent. The master clearly erred because this was a plain loan of cash by Phoenix Finance Cor-*

poration to the bridge company and the money was deposited in the bridge company account in the Iowa-Des Moines National Bank & Trust Company.) (Emphasis supplied.) (See Exhibit 30 H. L. Bump, bridge company pass book at bank; Exhibit 54 H. L. Bump, bridge company deposit tickets; Exhibit 37 H. L. Bump, bank statement; Exhibit 1, bridge company journal, page 197, line 16; and Exhibit 2, bridge company ledger, Notes Payable Account.)

3.

"*The master makes no reference to notes herein designated (b) and (d)* (the $500 note and the $12,110.19 note referred to in Finding 7-c *infra*) *but without stated reason or reference disallows them both as without consideration and fraudulent. These notes grow out of the same source and are analyzed together.* (Emphasis supplied.) From late 1931 to the middle of 1933, being a period long after the bridge was built, the bridge company was in dire need of money. Phoenix Finance Corporation loaned the bridge company cash both by direct transfer of money which was deposited by the bridge company in its bank account and also by Phoenix Finance Corporation paying debts and liabilities of the bridge company.

4.

"The master correctly allowed note (c) for $3,125.00 which was cash loaned to the bridge company and by it deposited in the bank and used to pay taxes in Wisconsin, but incorrectly found that this collateral pledge of bonds was valid only to the amount of the principal and interest of said note. He should have held the entire

pledge of bonds valid until the obligation secured thereby was paid in full.

5.

"The indebtedness for which these four notes was given could not be held fraudulent on this record and the master erred in so finding. It was incurred long after the bridge was built and under full knowledge and authorization of the bridge company directory board composed of directors who were concededly not 'Thompson men or associates.'

6

"The debt evidenced by these four notes was incurred by a directory board against which there is not a breath of suspicion. It represents cash—borrowed by the bridge company—in a time of need—when it couldn't borrow elsewhere. The four notes ought to be allowed in full, with interest thereon, and this $20,100 pledge of bonds should be held valid until the debt secured is fully paid."

The court, after hearing the various exceptions, rendered its opinion, its findings of fact and final decree (F.R., pp. 156-204). The court in its opinion said:

"Phoenix Corporation's exception No. 6 challenges the master's finding of fact No. 10" (F.R., pp. 164-165).

"Defendant and interveners' exception No. 8. This exception challenges so much of the master's fifth conclusion of law as makes the following exception to such conclusion: 'Except the bonds specifically named in paragraph 10 of the findings of fact;' and to so much of

the master's eleventh conclusion of law as makes exception to such conclusion, because the record does not warrant the exceptions" (F.R., pp. 165-166).

With reference to these exceptions the court said:

"This conclusion of law is attacked in the defendant and interveners' eighth exception. I think that insofar as the language of the master's conclusion includes $9,000 of bonds held valid in the hands of the Phoenix Finance Corporation, and the $3,125.00 in bonds held valid in the hands of the Phoenix Finance Corporation, it is erroneous. What I have said with respect to the legal status of the Phoenix Finance Corporation as the successors of Phoenix Finance System, Inc., places it completely upon the level with its predecessor so far as equities are concerned. With full notice it has adopted everything its predecessor did, and with full notice that its predecessor had at the outset taken 140 shares of stock of the bridge company without paying any subscription price therefor and has not accounted for it" (F.R., pp. 177-178).

"In view of the conclusion of the court, a decree should be entered overruling the exception of plaintiff trustees, numbered one to eight, inclusive, and of Phoenix Finance Corporation, numbered one to six inclusive, and exceptions reserved to the respective plaintiffs * * * and sustain defendant and interveners' exceptions numbered eight, nine and eleven with exceptions reserved to the plaintiffs" (F.R., p. 178).

The findings of fact of the court appear on pages 179 to 202 inclusive of the first record.

The court first takes up the findings of the master, and approves only those portions of findings 10 (i) and (k) which find that bonds approximating $19,000 or

$20,000 were without consideration, obtained by fraud and invalid. The court disapproved the finding of the master that $3,125.00 of the bonds had consideration and were valid (F.R., p. 179).

In addition to approving the findings of the master, the court made a number of additional findings, the most pertinent of which are the following:

"8. That Phoenix Finance Corporation, complainant and defendant to petition of intervention, is the successor in interest of Phoenix Finance System, Inc., and subject to all defenses and offsets to which said Phoenix Finance System, Inc., was at any time subject (F.R., p. 185).

"9. That this action was instituted by the plaintiffs herein as trustees upon the demand of Phoenix Finance Corporation, as owners and holders of $177,600 of the $200,000 of the bonds involved herein.

"That said Phoenix Finance Corporation referred to, agreed to secure and indemnify said trustees against all costs, expenses and liabilities incurred by them in taking the action demanded; and also designated the attorneys to be employed by the trustees, and agreed to save the trustees harmless on account of any claim by said attorneys for fees and expenses in connection with the litigation" (F.R., pp. 185-186).

By its findings Nos. 28, 29, 30, 41, the court determined that as a result of certain fraudulent transactions Phoenix Finance System, Inc., had become indebted to the bridge company in an amount of $26,085.85, and that Phoenix Finance Corporation took over as the successor in interest of Phoenix Finance System, Inc., with full knowledge of the facts and was subject to all liabili-

ties inherent in the position of Phoenix Finance System, Inc. (F.R., pp. 192-194, 202).

The court in its decree specifically overruled the exceptions of plaintiff trustees numbered 1 to 8, inclusive, and of Phoenix Finance Corporation numbered 1 to 6, inclusive, and sustained defendants' and interveners' exceptions numbers 8, 9 and 11 and decreed "that the mortgage and bonds in suit were fraudulently issued; that all bonds are without consideration, with the exception of bonds aggregating $15,000 hereinafter specified. That the bill of the plaintiffs be dismissed as to the plaintiff Phoenix Finance Corporation, and that the prayer of the bill be denied, except insofar as the decree provides for the protection of the holders of said $15,000 of bonds" (F.R., p. 204).

Said $15,000 of bonds were held by persons other than the Phoenix Finance Corporation (F.R., pp. 203-204).

Phoenix Finance Corporation filed a petition for rehearing and modification of decree, again claiming that the notes above mentioned furnished a consideration for said $20,100 of bonds (F.R., pp. 216-223). Paragraph 12 of the petition (F.R., pp. 219-220) refers to a number of affidavits attached to the petition and states: "The ultimate facts which can and will be proved on this point are that the bridge company knowingly procured large amounts of cash and full and fair consideration for the bonds now held by the Phoenix Coorporation."

The petition for rehearing refers to an affidavit of M. K. Thompson, in which the aforesaid notes and the claimed underlying considerations thereof are again set forth as claimed consideration for the bonds (F.R., pp. 325-326). And the petition refers to affidavits by L. J.

Skoner and W. S. Gault (Gault—F.R., p. 278; Skoner—F.R., pp. 308-310; 315-319, 323) in which both assert the notes in question and the claimed underlying considerations thereof as consideration for the bonds.

The petition for rehearing, among other things, prayed in the alternative:

"In case a rehearing is denied that the decree be modified so as to withhold from adjudication the right of petitioner to institute an action at law against the bridge company, if it so desires, for money had and received" (F.R., p. 223). Answer was filed thereto by defendant and interveners (F.R., pp. 394-410). A resistance was filed to the petition for rehearing and modification of decree (F.R., pp. 392-394).

The court overruled the petition for rehearing and for modification of decree (F.R., pp. 411-413).

An appeal was taken to the Circuit Court of Appeals by the trustees and Phoenix Finance Corporation, in which the plaintiffs-appellants again urged their claim that the aforesaid four notes furnished consideration for said bonds, and asserted that the $20,100 of bonds were collateral for loans and advances, by their assignments of errors (trustees' assignments 9, 12, 14 and 19, F.R., pp. 504, 506; Phoenix assignments 14, 15, 55, F.R., pp. 511-12, 526).

The Circuit Court of Appeals found that the $20,100 of bonds were issued to Phoenix as collateral to secure a purported indebtedness of $17,735.19; that the master had allowed $3,125, which was a just claim but was more than offset by the $14,000 and other items referred to in the opinion; that $9,806.10 of the amount were furnished by Phoenix to pay interest on bonds held by Phoenix, which

were known by the officers of Phoenix to be fraudulent; that $1,505.75 was charged for salaries to Phoenix officers and employees, in defense of which the court found no argument; and the remainder of the claim was for cash items alleged to have been advanced by Phoenix to the bridge company, which if allowable, were wiped out by the indebtedness of Phoenix to the bridge company (F.R. 1704).

Neither the master nor the court nor any of counsel (specially see F.R., Supp., p. 49, paragraphs 2 and 3 quoted *supra*) except present counsel, who labors under the handicap of being the fourth chief counsel for Phoenix in the case, had any difficulty in comprehending that the four notes, $2,000.00, $3,125.00, $500.00 and $12,110.19, respectively, and the purported indebtedness which they represented were specifically passed upon. The notes were referred to in the minutes of Thompson-Phoenix-controlled directors, purporting to authorize the issuance of the $20,100 of bonds (F.R., pp. 1028-1029), the $2,000 note was referred to in the minutes in the figure $5,-625.00, which it clearly appears from exception number 6 consisted of the $2,000 note, the $500 note and the $3,125.00 note. In the testimony of the witness, John A. Thompson (F.R., p. 563) he states: "However, the memorandum shows that the $20,000 face value of B bonds were in the possession of Phoenix, having been deposited as collateral by the bridge company to notes issued by the bridge company for borrowed money in the total sum of $17,735.19." The four notes making up this amount are shown on the notes payable account of the bridge company ledger entitled "Phoenix Finance System, Inc." (F.R., p. 1103), which is referred to in Phoenix' exception number 6 quoted *supra*, and the $2,000 note dated Decem-

ber 15, 1932, the $500 note dated December 31, 1932, the $3,125.00 note dated January 20, 1933, the $12,110.19 note dated July 7, 1933, were specifically set out in the affidavit of Mrs. M. K. Thompson, wife of John A. Thompson (F.R., pp. 325-326), and the claimed underlying indebtedness checks for $2,000 and $3,125 at page 325, while a purported copy of the checks is attached to affidavit of Lee J. Skoner (F.R., pp. 315 and 319).

Moreover, the exact relationship of the $2,000 note, the $500 note, the $3,125 note and the $12,110.19 note; the $17,735.19 total and the $20,100 of bonds, is shown on the statement, Exhibit B-28, H. E. B. (F.R., p. 829), which was before the master (F.R., p. 562).

There can be no question from a reading of the record as to the inclusion of the $2,000 note, the $3,125 note, the $500 note and the $12,110.19 note and the indebtedness they purported to represent in the findings of the master, the trial court and of the Circuit Court of Appeals.

The suit in the court of Delaware on the two notes, one of $2,000 and one of $3,125, is simply an attempt to relitigate matters determined by the federal courts in this case. Those notes and the claimed indebtedness which they purported to represent, were directly put forward as the considerations for bonds involved in this case, and the federal courts have found and decreed that they did not constitute a consideration. The fact that the defendant has appeared in the Delaware court and pleaded *res adjudicata* and that the case is now pending there does not affect the right to an injunction restraining the plaintiff from further prosecuting the action.

The Phoenix' erroneous assertions have made it necessary to unduly lengthen this brief by quotations from the record.

Finding 9-B—The 517 Shares of Stock.

"b. That on or about the 20th day of February, 1939, the said Phoenix Finance Corporation commenced an action in the Court of Chancery of the State of Delaware in and for New Castle County, entitled, Phoenix Finance Corporation, a corporation of the State of Delaware, plaintiff, versus Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware, defendant, and caused subpoena to be issued therein and served on said defendant and filed bill of complaint on February 18, 1939, asking to recover 517 shares of Class 'A' stock of the Iowa-Wisconsin Bridge Company, which was surrendered and cancelled at the time the said Phoenix Finance Corporation fraudulently procured the issuance of $60,500 of bonds involved in and as found in this action, and which stock this court and the Circuit Court of Appeals ordered, adjudged and found the said Phoenix Finance Corporation was not entitled to have reissued to it. That the defendant has answered in said cause, but that said cause has not been tried" (R., pp. 707-708).

See paragraph 7(b) of the supplemental and ancillary bill (R., p. 6) and Phoenix answer, paragraph 7(b) (R., p. 149), which admits that it commenced the action described in paragraph 7(b), seeking delivery to Phoenix of a new certificate for 517 shares of Class "A" stock; and admits that the certificate for these shares was delivered by Phoenix to the bridge company in connection with the $60,500 of bonds of the bridge company.

The suit referred to in this finding is an action filed in the Chancery Court of Delaware for the recovery of 517 shares of preferred stock of the bridge company (R., p. 6; Exhibit SC-2, R., pp. 301-307), to which the district court and the Circuit Court of Appeals decided that Phoenix was not entitled to. Phoenix caused this stock

to be cancelled when fraudulently obtaining bonds of the bridge company. John A. Thompson and his associates, controlling Phoenix Finance System, Inc., and dominating and controlling the bridge company, caused, as a part of a scheme, plan and conspiracy, a $200,000.00 bond issue and mortgage deed of trust to be issued to defraud the bridge company and its stockholders out of their property, and in connection therewith cancelled said 517 shares of stock while fraudulently obtaining $60,500 of bridge company bonds. (Opinion of Trial Court, F.R., pp. 156 to 179 and especially page 175; Findings of Fact, pages 179 to 202, and especially Findings 35, 36, 37, 38, 39; page 180; pages 196-202.)

It was alleged that the stock was fraudulently exchanged for bonds as a part of a fraudulent conspiracy and with this charge both the trustees and Phoenix took issue, and that placed directly before the court in making full disposition of the controversy, the question whether property used in a conspiracy as an instrumentality in the perpetration of a fraud may be recovered, and whether the stock should be returned to Phoenix if the transaction was found fraudulent.

The petition of intervention as amended alleged that the articles of the bridge company provided "• • • If less than all shares of Class 'A' (preferred) stock are to be redeemed, the shares to be redeemed shall be selected by lot or *pro rata* as the board of directors shall determine. Notice of the intention of the corporation to redeem shares of Class 'A' stock shall be mailed at least thirty days before the date of redemption to each stockholder of record of the shares to be redeemed • • •" (F.R., p. 76). "• • • Any Class 'A' stock purchased for redemption under any provision hereof, or otherwise,

shall be cancelled and not reissued. * * * As long as any of the Class 'A' stock shall be outstanding, the corporation shall not (except for the purpose of redeeming all of the Class 'A' stock) unless with the affirmative vote or written consent of the holders of at least two-thirds in amount of the Class 'A' stock then outstanding: (a) * * * (b) increase the authorized amount of the Class 'A' stock, or create any stock (or security convertible into stock), having any preference or priority over or equality with Class 'A' stock" (F.R., p. 77).

And par. 13 (F.R., pp. 80-81; amendment (F.R., p. 101) alleged in substance that John A. Thompson and others of Phoenix Finance System, Inc., acting in concert and as parties of a common scheme, plan and conspiracy to cheat and defraud the defendant corporation and its stockholders, and with intent to cheat and defraud said defendant corporation and its stockholders while controlling the board of directors of the defendant corporation, so manipulated the affairs of said company as to issue and deliver to Phoenix Finance System, Inc., $60,500 of bonds in exchange for 517 shares of its preferred stock. That in such transaction the parties of said plan and scheme, owning and controlling Phoenix Finance System, Inc., and controlling the defendant corporation, acted for the defendant corporation in a matter in which the interests of said corporation were adverse. That at the time of said transaction the defendant did not have any surplus with which to repurchase any of its stock, and that such pretended repurchase of stock was in violation of the statutes of Delaware and the issuance of such bonds a violation of its charter provisions, and that the transaction was *ultra vires* and void, and caused an impairment of the capital of the bridge company. * * * I and

(par. 16, F.R., pp. 80-81) alleged "that all the acts and proceedings of said Thompson and associates and said Phoenix Finance System, Inc., were in (furtherance) of a scheme and conspiracy to defraud the stockholders of defendant of their rights and equity of redemption in defendant's property * * *." *20.

Phoenix in its answer denied the allegations of the petition of intervention and placed them in issue and prayed for general equitable relief (F.R., pp. 91, 92). The trustees filed a reply denying the allegations of the petition of intervention (F.R., pp. 102, 103). The order of reference directed the master to report "whether the evidence and the pleadings entitled complainants or the other parties herein to the relief, or any part thereof, prayed in their respective pleadings" (F.R., p. 108).

The master found that at the time of the exchange and surrender of stock for bonds, there was an impairment of the capital of the bridge company in violation of the Delaware statutes, and that there were outstanding other shares of preferred stock of the bridge company, the holders of which were not given notice or opportunity to surrender it as required by the articles of incorporation of the company, and that all stock of like kinds was not redeemed at that time, nor a portion thereof called by lot after notice so as to provide fairness and equity between all stockholders, and that it was done for the sole advantage of Thompson and his controlled companies (Phoenix) and to the disadvantage of other like stock-

*20. Transactions in which common directors and officers of two corporations act, in which the interests of such corporations are adverse, are presumptively fraudulent. (Geddes v. Anaconda Mining Co., 254 U. S. 590.)

holders and done in carrying out a fraudulent conspiracy, and that the transaction was fraudulent, *ultra vires*, illegal and void (Master's Findings 5, 6 and 7, F.R., pp. 129-130; 136-137).

The court made like findings that the stock was surrendered and cancelled at the time Phoenix fraudulently procured the bonds and found that it was done as a part of a fraudulent conspiracy to acquire the ownership of the bridge to the exclusion of the bridge company and its other stockholders (F.R., p. 180, Findings 6 and 7; F.R., pp. 196-199, Findings 35, 36, 37; F.R., pp. 200, 201, Finding 39. See Court's opinion, F.R., p. 157). And the court in its decree did not direct that the stock be returned to Phoenix (F.R., pp. 202-204).

Phoenix, recognizing that the issue as to the right to return of the stock had been adjudicated, filed its petition for rehearing and modification of decree and in it asserted: "As further ground for the relief herein prayed, Phoenix Finance Coporation shows to the court that through inadvertence, oversight or misapprehension of the facts in this case, the court invalidated $60,500 of bridge company bonds held by Phoenix Finance Corporation for which the last named company surrendered to the bridge company 517 shares of its capital stock, which was the admitted property of Phoenix at the time, and the court has wholly failed to reinvest Phoenix with this stock, but, on the contrary, has not alone invalidated the bonds but deprived Phoenix of the capital stock which it surrendered therefor" (F.R., p. 222). And prayed, among other things:

"Third. In case rehearing is denied, the decree be so modified as to reinvest in petitioner 517 shares of 'A' stock surrendered in exchange for bonds" (F.R., p. 223).

The allegations and prayer of the petition for rehearing and modification of decree were placed in issue by the answer of defendant and interveners thereto, alleging that "the 517 shares of capital stock surrendered to the bridge company were so turned over as a part of the fraudulent scheme, plan and conspiracy and to fraudulently procure from the bridge company $60,500 of bonds fraudulently issued, and that such transactions were but part and parcel of the fraudulent scheme, plan and conspiracy, and that the complainants are not entitled to have the * * * stock returned. That money or property used to perpetrate a fraud cannot be recovered" (F.R., p. 398).

The trial court ruled:

"Anticipating an adverse ruling, the petitioners alternatively pray for a modification of the decree with provisions commanding the re-issuing of certain shares of stock to Phoenix Finance Corporation, which it cancelled when fraudulently obtaining the bonds. One might conceive some invidious analogies to this situation. Having attempted the strong box of another and being hoist by what is now claimed to be a premature explosion, they volubly invoke the compassion of the court to retore valuable implements of their craft left behind. I see no reason why a court of equity should be deeply concerned in giving an affirmative relief to the Phoenix Finance Corporation. On the other hand, I think the petitions for rehearing should be denied and the motion to dismiss and vacate the decree overruled, and it will be so Ordered" (F.R., p. 413).

Phoenix Finance Corporation on appeal to the Circuit Court of Appeals, by its assignment of errors again presented the question of its right to said stock (Assign-

ments of error 10, 44, F.R., pp. 510; 522, 523, and especially assignment 62, p. 527).

Assignment 62 is as follows:

"The court abused its discretion in denying, as an alternative to the petition for rehearing, that the decree be so modified as to reinvest in the Phoenix Finance Corporation the 517 shares of 'A' stock surrendered by it to the bridge company in exchange for bonds."

The Circuit Court of Appeals overruled such assignments and held that Phoenix Finance Corporation was not entitled to the return of the stock. 98 Fed. (2) 416 at 428 (F.R. 1707-1708).

The Delaware case is in chancery and in it Phoenix Finance Corporation asks for the same thing, the reissuance of said 517 shares of stock, based on the same identical transaction which was before this court when such relief was denied. There was only one transaction in which the bridge company issued $60,500 of bonds in connection with the cancellation of 517 shares of stock, and that is the one which was involved in this case as a part of the fraudulent conspiracy and the one in which the stock was cancelled while Phoenix Finance Corporation was fraudulently obtaining the bonds. That matter has been fully determined by the federal courts (Exhibit SC-2, R., pp. 301-307; trial court's opinion, F.R., pp. 156-179; court's findings, F.R., pp. 180-202; court's opinion, F.R., pp. 411-413; F.R., pp. 829; 1262 first item; F.R., pp. 981-982; F.R., bottom p. 541).

Finding 9-C—The $500 and $12,110.19 Notes.

"c. That the said Phoenix Finance Corporation has commenced an action in the Superior Court of Delaware in and for New Castle County entitled

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware, versus the Iowa-Wisconsin Bridge Company duly organized and existing under the laws of the State of Delaware, being case No. 65, September Term, 1939, and has caused summons to be issued against said Iowa-Wisconsin Bridge Company returnable at Wilmington, Delaware, on the 18th day of September next, to answer said Phoenix Finance Corporation of a plea of trespass on the case, etc.; that said summons was caused to be issued on the 22nd day of June, 1939, and served on the defendant. That the alleged cause of action in said suit is based upon an alleged promissory note of $500.00, dated December 31, 1932, an alleged promissory note for $12,110.19, dated July 7, 1933, an alleged claim for $15,000 for money claimed to have been lent and advanced by defendant to plaintiff in that case and upon alleged claim for $7,000 claimed to have been for money due and payable from the defendant to the plaintiff in that case, Phoenix Finance Corporation, for interest and forbearance. That the said alleged promissory notes of $500.00 and $12,110.19 were involved in the above entitled cause and the adjudication thereof; that in this case it was claimed that said notes and the alleged considerations therefor formed part of the consideration for the issuance of $20,100 of bonds involved in this action. That this court found that the said bonds were fraudulently issued and wholly without consideration and were more than offset by indebtedness of Phoenix Finance Corporation and its predecessor, Phoenix Finance System, Inc., to this defendant, Iowa-Wisconsin Bridge Company. That as to the alleged claim for $15,000.00 this is a mere restatement of the alleged cause of action on the notes aforesaid stated in different form and in the alternative and the alleged claim for $7,000.00 is merely a claim for interest on the notes aforesaid set forth in a different form and

in the alternative. That all of said alleged claims were involved in and adjudicated in the above entitled cause in this court'' (R., pp. 708-709).

See paragraph 7(c) of the supplemental and ancillary bill (R., pp. 6-7; R., p. 98) and Phoenix answer, paragraph 7(c) (R., p. 149), which admit that it filed the answer described in paragraph 7(c), based upon promissory notes of $500 and $12,110.19, dated as set forth in the amendment, and that the Delaware cause claimed $7,000 and interest to July 1, 1939, and admits that the common counts in the sum of $15,000 were also pleaded in the action. It also admits that the court in its decree set forth that the mortgage and bonds sought to be foreclosed were fraudulently issued, and that all bonds, with the exception of certain bonds aggregating $15,000, were without valid consideration.

The suit referred to in this finding involves one note of $500 and one note of $12,110.19 (R., 6-7, 98; Exhibit S(-3, R., pp. 307-319), which were part of an alleged indebtedness to Phoenix Finance Corporation secured by $20,100 of bonds involved in this case and are in exactly the same position as the $3,125 note and the $2,000 note referred to above under sub-paragraph (a); the same record citations mentioned under sub-paragraph (a) above apply thereto, and for the purpose of brevity, will not be repeated here. The other allegations in the declarations are under the Delaware practice mere reiteration of the same alleged indebtedness in different form. All of said notes, to-wit: $2,000, $3,125, $500, $12,110.19, were part of an alleged indebtedness to the Phoenix Finance Corporation secured by $20,100 of bonds involved in this case and which this court and the Circuit Court of Appeals have found to be without consideration and now the

Phoenix Finance Corporation is attempting to sue on such notes, and to re-litigate the matter of consideration, which this court found did not exist.

The statement in petitioner's brief, page 31, that "There is no finding or conclusion, either of the master or of the district court, which is specifically and directly referable to the two notes of $12,110.19 and $5,000, respectively, for which Phoenix is suing the bridge company in Delaware in this action," as hereinbefore noted above is without foundation.

This statement must be criticized in the same manner as the similar statement made with reference to the $2,000 note. All that has been said in the comment under finding 7(a) here applies because the two notes here involved represented a part of the claimed indebtedness of $17,735.19, for which it was claimed that the $20,100 of bonds had been given as collateral security; the notes were constantly referred to in the testimony in the exceptions; in the petition for rehearing, and in the former brief of counsel for Phoenix, as has been specifically pointed out, and the bonds securing them were specifically held by the master, the district court, and the Circuit Court of Appeals, to have been without consideration and offset by indebtedness of Phoenix to the bridge company, and it was specifically held by the master and both courts that there were no underlying considerations for them and consequently no underlying considerations for the notes.

Finding 9-D—The Fraudulent Guaranty Agreement.

"d. That the said Phoenix Finance Corporation commenced another action in the Superior Court of Delaware in and for New Castle County, entitled

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware versus the Iowa-Wisconsin Bridge Company, duly organized and existing under the laws of the State of Delaware, being Case No. 64, September Term 1939, and caused summons to be issued against said Iowa-Wisconsin Bridge Company returnable at Wilmington, Delaware, on the 18th day of September next, to answer said Phoenix Finance Corporation of a plea 'that it hold and keep with it the covenant between them made according to the force and effect of said articles of agreement between them, etc.' That the said Phoenix Finance Corporation caused said summons to be issued on the 22nd day of June, 1939, and caused the same to be served on the defendant. That the alleged cause of action in said suit is based on an alleged agreement claimed to have been entered into between Phoenix Finance System, Inc., John W. Shaffer & Company, and Iowa-Wisconsin Bridge Company, dated November 10, 1930, under and by virtue of which said Phoenix Finance Corporation claims defendant became indebted to Phoenix Finance System, Inc., in the sum of $21,-262.71, claims to be the assignee of said Phoenix Finance System, Inc., and claims the total sum of $50,000.00 for principal and interest; that attached to the declaration in said case is a copy of said purported agreement. That said agreement so referred to in said declaration and sued upon is the same agreement described and referred to by this court in its finding of fact No. 24, appearing at pages 13, 14 and 15 of Exhibit B attached to the Supplemental and Ancillary Bill of Complaint, which the court found to be without consideration, a fraud upon the bridge company, void and *ultra vires*" (R., p. 709).

See paragraph 7(d) of the supplemental and ancillary bill (R., pp. 7, 98-99) and Phoenix answer, paragraph 7(d) (R., pp. 149-150), as follows:

"Answering paragraph 7(d) Phoenix admits the allegations thereof contained in the supplemental and ancillary bill before amendment, and admits the allegations contained in the first sentence of the paragraph added to paragraph 7(d) by amendment: (being the same as the first sentence of finding 9(d)) *admits that the agreement sued upon in said Delaware action* is referred to in finding No. 24 of this court." (Emphasis supplied.)

The suit referred to in this finding is an action to recover on an alleged guaranty agreement dated November 10, 1930 (R., pp. 7, 98-99; Exhibit SC-4, R., pp. 320-339).

This is the same identical fraudulent guaranty agreement that was involved in this case (Exhibit Johns A-G and also known as Exhibit Shaffer "E," F.R., p. 1393, bottom, and pp. 1394 and 1395). Said declaration in connection with such alleged guaranty agreement makes reference to contract between John W. Shaffer & Company and McClintic-Marshall Company and to a contract between John W. Shaffer & Company and Industrial Contracting Company, both of which were involved in this case (Exhibit SC-4, R., pp. 325-328; R., pp. 328-334; Exhibit Shaffer "D," F.R., pp. 850-851; 568-587; Exhibit Pendergast "F," F.R., pp. 1395-1399; 623-624). The alleged guaranty agreement forming the basis of this Delaware action was found without consideration, fraudulent, void and *ultra vires* by the trial court in this case. (Court's Opinion, F.R., pp. 170-172; Court's Finding of Fact No. 24, F.R., pp. 189-191.) The court further found that Phoenix Finance Corporation was indebted to the bridge company for the $14,000 of stock which it procured under said fraudulent guaranty contract (Court's Finding of Fact No. 27, F.R., pp. 192-193). The $21,262.71

claimed in this Delaware action is the $10,000 which it was claimed in this case was advanced by the Phoenix Finance System, Inc., to pay the Industrial Contracting Company and the $11,262.71 to pay McClintic-Marshall & Company, and which it was claimed in this case constituted a consideration for the issuance of bonds to the Phoenix Finance Corporation, and which both courts below found were not obligations of nor owed by the bridge company, and furnished no consideration for the issuance of the bonds. (Court's Findings of Fact Nos. 32, 33 and 34; F.R., pp. 194-196 and 281 and Court's Finding of Fact No. 40, pp. 201-202; opinion Circuit Court of Appeals, F.R. 1702-1703.)

Finding 9-E—The Helmer Anderson Bonds.

"e. That the said Phoenix Finance Corporation commenced another action in the Superior Court of Delaware in and for New Castle County, entitled Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware, versus the Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware, being Case No. 79, September Term 1939, and caused summons to be issued against said Iowa-Wisconsin Bridge Company returnable at Wilmington, Delaware, on the 18th day of September next, to answer said Phoenix Finance Corporation of a plea of trespass on the case, etc. That said Phoenix Finance Corporation caused said summons to be issued on the 11th day of July, 1939, and served on the defendant. That the alleged cause of action in said suit is based on certain of the bonds which were involved in the above entitled action, to-wit: One series B Bond No. 93 in the face amount of $500.00; one Series B Bond No. 97 in the face amount of $500. That this court in its final decree, adjudged and held that all bonds held by Phoenix Finance Cor-

poration were invalid, fraudulent and issued without consideration, and that this court found certain bonds which had been issued to Helmer Anderson in the total amount of $7,400.00 to be valid to the extent of $6,000.00 only, and directed that said sum of $6,000.00 be paid from income of the bridge company; that said Series B Bonds Nos. 93 and 97, upon which suit has been commenced in the State of Delaware as hereinbefore set forth, are portions of the $7,400.00 of the bonds issued to Helmer Anderson and allowed in part by this court as aforesaid.

"That sixty-seventy-fourths (60/74) of the face value of said bonds with accrued interest to May 1, 1939, has been available since May 1, 1939, and will be paid to the lawful holder of said bonds by the receiver of this court on surrender of said bonds" (R., pp. 709-710).

See paragraph 7(e) of the supplemental and ancillary bill (R., pp. 7, 99) and Phoenix answer, paragraph 7(e) (R., p. 150), which admits that it filed the action described in paragraph 7(e), and admits that its cause of action in Delaware is based upon two Series B bonds of the bridge company, numbered 93 and 97, in the face amount of $500.00 each; admits that bonds in the total amount of $7,400, originally issued to Helmer Anderson, were allowed by this court to the extent of $6,000, and were directed to be paid from income of the bridge company, and admits that said bonds numbered 93 and 97 constitute part of the bonds originally issued to Helmer Anderson by the bridge company.

This suit is an action to recover on bonds numbered 93 and 97 of the Iowa-Wisconsin Bridge Company (R., pp. 7, 99; Exhibit SC-5, R., pp. 340, 373).

This court decreed that all of the bonds were fraudulent and without consideration except bonds aggregat-

ing $15,000 specified and held by others than the Phoenix Finance Corporation (F.R.., pp. 203-204). There were issued to Helmer N. Anderson on a $6,000 consideration $7,400 of bonds (F.R., pp. 985-986). These were allowed by the court in its decree to the extent of $6,000 (F.R., p. 204). These bonds to Helmer N. Anderson include bonds numbers 93 and 97. There was only one issue of bonds of the bridge company, all of which were involved in this action. Phoenix Finance System, Inc.'s bonds were all disallowed and the only bonds that Phoenix in the Delaware suit can now be attempting to sue on by said numbers 93 and 97 are bonds issued to Helmer N. Anderson, the partial allowance of which is also covered by the decree in this case. Helmer N. Anderson and any successor of his to any of said bonds is bound by the decree in this cause and it is not necessary to determine at this time whether Phoenix acquired said two bonds and is the lawful holder thereof. In any event, it is not entitled to maintain an action thereon in Delaware. Such bonds must be presented to the district court. Instead of presenting the bonds to the district court for payment in accordance with the terms of the decree, Phoenix is attempting to recover in the courts of Delaware the full amount of the bonds with interest on the full amount in direct violation of the terms of the decree.

Finding 9-F—All Issues in Delaware Suits Determined in Former Decree.

> "f. That all ultimate facts and issues involved and presented in each of the actions above referred to now pending in the courts of the State of Delaware and brought by the Phoenix Finance Corporation against the Iowa-Wisconsin Bridge Company and specified or referred to in the Supplemental and

Ancillary Bill of Complaint as amended of the Iowa-Wisconsin Bridge Company, were within the issues involved and were fully considered and determined by the trial court in its original final decree and order denying petition for re-hearing and for modification of decree, which court order and decree were affirmed by the Circuit Court of Appeals for the Eighth Circuit.

"Cause No. 159, September Term, 1939, in the Superior Court of the State of Delaware in and for New Castle County, involving alleged toll tickets, and defenses thereto, is excepted herefrom" (R., pp. 710-711).

This is a general finding based on the court's judicial knowledge and the entire record in this case.

Finding No. Ten.

"That John A. Thompson, who was found by this court in this case, as controlling the Phoenix Finance Corporation, while dominating and controlling the bridge company in a fraudulent scheme, plan and conspiracy to cheat and defraud the bridge company and stockholders, asserted on the 8th day of July, 1939, that there never was any litigation between Phoenix and the bridge company; that the alleged indebtedness of the bridge company and the Phoenix could be properly presented and put down in the Delaware court; that there were six cases down there now that would be carried on through the courts in the next few months; one all finished, except the decision of the court, and five others to follow" (R., p. 711).

See paragraph 9 of the supplemental and ancillary bill (R., p. 8) and Phoenix' answer (R., p. 150), which admits "that on the 8th day of July, 1939, John A. Thompson

did say that there were six suits pending in the State of Delaware that would be carried on in the course of the next few months."

The finding with reference to control, see former record, finding of master 4(a), approved by court (F.R., pp. 179-180); finding of court 19 (F.R., p. 188); finding 24 (F.R., p. 190); finding 26 (F.R., pp. 191-192); findings 27, 28, 29, 30 (F.R., pp. 192-194); finding 35 (F.R., p. 196); finding 37 (F.R., pp. 197-198); finding 40 (F.R., pp. 201-202). See resistance of Phoenix to motion depositions be not taken (R., p. 201, lines 8-10, offered, p. 269; R., p. 204, lines 3-10, offered, R., p. 270).

Finding No. Eleven.

"That said John A. Thompson on the 23rd day of November, 1938, wrote the stockholders of the Iowa-Wisconsin Bridge Company: 'I am not asking you or any other man to help me or to help Phoenix; Phoenix does not need any help in its fight to maintain its creditor position. In the end the facts will all be proved in competent courts, I am not a bit disturbed about the final outcome,' etc.

"That on the 12th day of June, 1939, the said John A. Thompson, president of the Phoenix Finance Corporation, wrote to a stockholder and director of the Iowa-Wisconsin Bridge Company:

"'Now Phoenix claimed outright ownership of $97,000 and $60,500, or a total of $157,500 of bridge bonds. The $60,500 were bonds received in connection with the retirement of 517 shares of preferred stock which was unquestionably owned and paid for by Phoenix, so if the bonds were no good, certainly the bridge company must return the 517 shares of preferred stock to Phoenix. A suit is now pending in Delaware to enforce the bridge company to do

that which it should in fairness and honesty do without a lawsuit, and there is not the slightest doubt that the Delaware courts will make the bridge company make good on the $60,500 of bonds or return the 517 shares of preferred stock. So while this lawsuit may have resulted in the elimination of the $60,500 of bonds as a bonded debt, that was not a gain of $60,500 to the bridge company by any means.

" 'As to the $97,000 worth of bonds, even if the mortgage deed of trust had been adjudicated and eliminated, and it is still shown that the bridge company owes the $97,000 for legitimate borrowings, it makes little difference whether the bridge company pays the debt by reason of a mortgage foreclosure or by way of a judgment and execution against the bridge.

" 'We have to this point accounted for $22,400 of bonds in the hands of third parties, eliminated by legitimate retirement of the full amount owing thereon, and $157,500 worth of bonds, the collection of which has been temporarily stayed, making a total of $179,900 and leaving $20,100 yet to be accounted for.

" 'These $20,100 of bonds were pledged as collateral against bridge company notes for borrowed money, totaling $17,735.19. Suits are now pending on these notes in the Delaware courts, and there is not the slightest chance that they will not be collected, because here Phoenix will have opportunity to present its evidence, which was never done in any of the proceedings in Federal Court, and could not properly be done because Phoenix and the bridge company both being Delaware corporations, could not carry on as proper parties with adverse interests in a Federal Court proceeding, as you well know.'

"That all of said matters were involved in this cause and determined by this court's decisions" (R., pp. 711-712).

See paragraph 10 of the supplemental and ancillary bill (R., pp. 9-10) and Phoenix answer, paragraph 10 (R., pp. 150-151), admitting that John A. Thompson on November 23, 1938, wrote a letter to the stockholders of the bridge company containing the substance of, but not precisely, the matter as it is purported to be quoted in the supplemental and ancillary bill herein, and admitting that on June 12, 1939, John A. Thompson wrote to a stockholder and director of the bridge company substantially, but not precisely, as quoted in paragraph 10 of the supplemental and ancillary bill herein, and offering to present due and correct copies of said letters at the trial.

See also Exhibits "A" and "B" attached to schedule, entitled testimony of John A. Thompson, a part of resistance of Phoenix to motion that depositions be not taken (R., pp. 211-214; 214-217; offered, R., pp. 270-271).

Finding No. Twelve—Recording of Mortgage.

"That on June 2, 1939, the complainant, Phoenix Finance Corporation, caused to be recorded in the office of the County Recorder in Book L, pages 625, 626, of Allamakee County, Iowa, and on the 18th day of May, 1939, caused to be recorded in the office of the Registrar of Deeds of Crawford County, Wisconsin, in Volume 153, page 293, an alleged mortgage of the Iowa Wisconsin Bridge Company to the Phoenix Finance System, Inc., in the sum of $50,000 dated March 10, 1931, which this court in this cause found to be without consideration, fraudulent and void, issued as a part of a scheme, plan and conspiracy to cheat and defraud the bridge company and its stockholders. That by the recording of said alleged mortgage said Phoenix Finance Corporation has wrongfully cast a cloud upon the title of the defendant to its property and has attempted to render null and

void that portion of the findings and decree and order of this court finally determining the invalidity of said mortgage'' (R., pp. 712-713).

See paragraphs 11 and 12 of the supplemental and ancillary bill (R., pp. 10-11) and Phoenix answer, paragraph 11 (R., p. 151), denying each and every allegation of paragraph 11 except the admission that on June 2, 1939, it caused to be recorded in the office of the County Recorder in Book L, pages 625-626 of the records of Allamakee County, Iowa, a certain mortgage executed by the bridge company to Phoenix Finance System, Inc., in the sum of $50,000, dated March 10, 1931, and admitting that the trial court in its findings made reference to this mortgage substantially as set forth in paragraph 11 of the supplemental and ancillary bill herein.

The trial court in this cause originally found:

''That in truth and in fact no indebtedness of said bridge company to the Phoenix Finance System, Inc., existed and the bridge company received no consideration for the execution of said mortgage; that the same was and is wholly without consideration, fraudulent and void. At said time said Thompson caused entries to be made on the books of said bridge company purporting to show the receipt of $50,000 in cash, whereas, in truth and in fact, said amount and no part thereof was received by the bridge company'' (court's finding No. 26, F.R., pp. 191-192; also court's opinion, F.R., pp. 172-173).

And the trial court found that bonds of the bridge company were issued for this fraudulent mortgage to the Phoenix (court's finding No. 40, F.R., p. 201).

The court held all the bonds issued to Phoenix fraudulent and without consideration. Phoenix Finance

Corporation in its petition for rehearing, in the alternative, prayed:

"Second. In case rehearing is denied, then as alternative, relief that the decree be modified so as to withhold from adjudication the question of the validity of the $50,000 mortgage given by the bridge company to petitioner, reserving the right to petitioner to litigate said mortgage in another action, if it so desires" (F.R., p. 223). Which petition was overruled (F.R., pp. 411-413). The order of the trial court overruling the petition was sustained by the Circuit Court of Appeals (F.R. 1707).

Finding No. Thirteen.

> "That the complainant Phoenix Finance Corporation as hereinbefore set forth is threatening to and unless restrained by this court will proceed to institute and prosecute actions as aforesaid and will permit to remain on record the invalid $50,000 mortgage aforesaid; that unless said complainant Phoenix Finance Corporation is restrained by this court as herein prayed the defendant will be deprived of the fruits and advantages of the judgment, decree and orders of this court in this cause and said complainant will continue with vexatious suits in utter disregard thereof; that the acts of said Phoenix Finance Corperation will cast a cloud over defendant's title and franchise because of a multiplicity of vexatious suits brought and to be brought against defendant and it will be damaged in a way that cannot be repaired or estimated at common law, and from these threatened wrongs the defendant has no remedy at common law but the only remedy is in equity" (R., p. 713).

See paragraph 12 of the supplemental and ancillary bill (R., pp. 10-11) and Phoenix answer, paragraph 12

(R., p. 151) denying each and every allegation of paragraph 12, except that it admits it intends to prosecute the actions described in paragraph 7 of the supplemental and ancillary bill and proposes to permit to remain on record the $50,000 mortgage above described to the extent that it is not restrained by injunction.

This finding is based on the court's judicial knowledge and the entire record in the case.

The Court then made its conclusions of law (R., pp. 713-717).

See also court's opinion (R., pp. 717-718).

FINAL DECREE.

The court ordered, adjudged and decreed that the complainant Phoenix Finance Corporation, its officers, agents, servants, employees and attorneys, be permanently enjoined and restrained in anywise from prosecuting, conducting or carrying forward in any manner whatsoever any and all of the matters, things and questions joined in the actions of law and equity instituted by the Phoenix Finance Corporation against the Iowa-Wisconsin Bridge Company in the State of Delaware, and the decree then describes the five law suits enumerated in the court's finding of fact.

The court further decreed as follows:

> "That said Phoenix Finance Corporation, its officers, agents, servants, attorneys and employees and all those acting by or through or for them and its successors and assignees, jointly and severally are commanded and ordered forthwith to satisfy, release and remove from the records of the Recorder's office of Allamakee County, Iowa, and from the records of

the Registrar of Deeds of Crawford County, Wisconsin, that certain mortgage executed by Iowa-Wisconsin Bridge Company to Phoenix Finance System, Inc., dated March 10, 1931, covering the property and assets of Iowa-Wisconsin Bridge Company, which said mortgage was filed for record and recorded in the office of the Recorder of said Allamakee County, Iowa, on or about the 2nd day of June, 1939, and recorded in Book L, pages 625, 626, and which was recorded in the office of the Registrar of Deeds of Crawford County, Wisconsin, on the 18th day of May, 1939, and recorded in Volume 153, page 293, and that they deliver the original of said mortgage and note secured thereby for cancellation to the Clerk of this Court.

"And the said Phoenix Finance Corporation, its officers, agents, servants, employees and attorneys are hereby directed and commanded to forthwith dismiss the aforesaid cases at the cost of the Phoenix Finance Corporation.

"And the said Phoenix Finance Corporation, its officers, agents, servants, employees and attorneys are hereby permanently enjoined and restrained from commencing, prosecuting, or bringing in question, or in any manner carrying forward any suits or causes of action involved in or determined in the Findings of Fact and Conclusions and Final Decree dated December 1, 1936, and order denying petition for rehearing and modification of decree filed in this cause on March 4, 1937.

"That the entire costs in this case on supplemental and ancillary bill be taxed to complainant, Phoenix Finance Corporation" (R., pp. 719-722).

Phoenix served notice of appeal (R., pp. 723-724) and procured order granting stay and approving supersedeas bond (R., pp. 725-726), and filed supersedeas bond (R., pp. 724-725).

On the 18th and 19th days of September, 1940, the appeal was argued before the Circuit Court of Appeals and submitted (R. 766-767) and that court on the 26th day of October, 1940, rendered its opinion and decree affirming the decision of the trial court (R. 767-788). And petition for rehearing was denied by that court on November 16, 1940 (F.R. 831).

ARGUMENT.

POINT ONE.

(Answer to Petitioner's Point One.)

Petitioner's point is not applicable. The effect of the decrees and orders of the federal courts in the instant case is controlled by the decisions of the Supreme Court of Iowa and of this court.

In this case the writ of certiorari is to the Circuit Court of Appeals for the Eighth Circuit to review its decision affirming a decree of injunction rendered by the United States District Court for the Northern District of Iowa to enforce its own decrees and orders and to preserve the fruits thereof. The writ does not involve the question whether the Federal Court gave full faith and credit to the decisions of another court. No such question was involved. No decision of another court was pleaded or offered in evidence. In fact, the decision of the Delaware Superior Court referred to by petitioner was not then in existence.

The rule is of almost universal application that questions of whatever nature, not raised and properly preserved for review in the trial court, will not be noticed on appeal.

> 4 Corpus Juris Secundum 430, Sec. 228.
> *Duignan* v. *United States, et al.*, 274 U. S. 195.

No such question was presented by petitioner's answer (R. 147) or mentioned in the trial court's decision (opinion, R. 717, 32 Fed. Supp. 277) nor in petitioner's statement of points on which it intended to rely on appeal (R. 732-735), nor presented by petitioner in Circuit Court of Appeals nor mentioned in its decision. (Opinion Circuit Court of Appeals, R. 767-786; 115 Fed. (2) 1.)

The order granting preliminary injunction was rendered on the 28th day of September, 1939, and final hearing on permanent injunction was had and the cause submitted on the 11th day of March, 1940, and the final decree of permanent injunction was entered March 23, 1940.

In Freeman on Judgments (5th Ed.), Vol. 2, Sec. 1070, pages 3018, 3019, it is stated:

> "Within the limits of their jurisdiction, and the limitations hereinafter stated, the judgments and decrees of the Federal Courts generally are entitled to the same force and effect, so far as *res judicata* and collateral attack are concerned, as would be accorded to the judgment of a state court of record under like circumstances." Citing:
>
> *Bigelow* v. *Old Dominion Copper Co., supra.*
> *Pittsburgh C. C. & L. Ry. Co.* v. *Long Island L. & Tr. Co.* 172 U. S. 493, 43 L. ed. 538, 19 S. Ct. 238.
> *Thompson* v. *Lee County*, 22 Iowa 206.
>
> "Thus it has been said that 'judgments and decrees of the Circuit Court of the United States sitting in a particular state, in the courts of that state, are to be accorded such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority;' and whether they have been accorded such effect is a question the determination of which is within the jurisdiction of the Supreme Court of the United States." Citing:
>
> *Crescent L. S. Co.* v. *Butchers' Union*, 120 U. S. 141, 30 L. ed. 614, 7 S. Ct. 472
> *Hancock Nat. Bank* v. *Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 S. Ct. 506.

The effect which a judgment has in the state where rendered is precisely the effect which must be accorded it in every other state court. The effect of the decrees and orders of the Federal Courts in the instant case is controlled by the decisions of the Supreme Court of Iowa and of this court.

U. S. Revised Statutes, Sec. 905.
Freeman on Judgments (5th Ed.), Vol. 2, Sec. 3186.
Marin v. *Augedahl*, 247 U. S. 142, 62 L. ed. 1038, 38 S. Ct. 452.
Fauntelroy v. *Lum*, 210 U. S. 230, 52 L. ed. 1039, 28 S. Ct. 641.
Harding v. *Harding*, 198 U. S. 317, 49 L. ed. 1086, 25 S. Ct. 679.
Hanley v. *Donaghue*, 116 U. S. 1, 29 L. ed. 535, 6 S. Ct. 242.
Owsley v. *Central Trust Co.*, 196 Fed. 412.
Carpenter v. *Beal-McDonnell & Co.*, 222 Fed. 453.
Ashby v. *Manley*, 191 Iowa 113, 181 N. W. 869.
Bigelow v. *Old Dominion Copper Mining & Smelting Co.*, 225 U. S. 111, 32 S. Ct. 641-644.

The long-established rule of national courts as to the effect of judgments as *res judicata* is re-stated in the opinion of the Circuit Court of Appeals in this cause and the decisions of the Supreme Court of Iowa are in harmony therewith.

Phoenix Finance Corporation v. *Iowa-Wisconsin Bridge Co.*, 115 Fed. (2) 1.
King City, Mo. for use and benefit of U. S. Cast Iron Pipe and Foundry Co. v. *Southern Surety Co.*, 212 Iowa 1213, 238 N. W. 93.

POINT TWO.

(Answer to Petitioner's Point Two.)

The decrees and orders of the District Court and of the Circuit Court of Appeals in the foreclosure cause constitute adjudications against Phoenix of the several issues and controversies involved in the supplemental and ancillary proceedings.

(a) Phoenix was a party by representation, and an ancillary party (F.R. 1689 at 1694).

> *First Trust & Savings Bank* v. *Iowa-Wisconsin Bridge Co.*, 98 Fed (2) 416 at 421, Cert. den. 305 U. S. 650, Rehearing den. 305 U. S. 676.

The fact that a party to a judgment is merely a "proper" and not a "necessary" pary does not relieve him from the conclusive effect of the adjudication.

> Freeman on Judgments (5th Ed.) Vol. 1, Sec. 430, p. 936.

One, thought not a party, is bound by the judgment in a suit prosecuted at his instance and on his behalf and for his benefit.

> Freeman on Judgments (5th Ed.), Vol. 1, sec. 430, p. 638.
> *Souffrant* v. *La Compagnie & Des Sourcreries*, 217 U. S. 475.

Where a *cestui que trust* employs counsel and has an answer filed in the name of the trustee the decision is *res judicata* between the same plaintiff and the *cestui que trust*, on the same subject matter.

> *Plumb* v. *Crane, Admr., etc.*, 123 U. S. 560.

The decree provides (F.R. 214): "That the bill of the *plaintiffs* be dismissed as to the plaintiff, Phoenix Finance Corporation, and the prayer of the bill denied, except insofar as the decree provides for the protection of the bondholders of said $15,000 in bonds; that foreclosure and sale of the mortgage property be denied," etc., and then provides for sequestration of income.

The entire bill was dismissed, except insofar as relief was provided for certain holders of bonds. It was dismissed as to both the trustees and Phoenix, as far Phoenix was concerned.

> "A general judgment or decree of dismissal, with nothing more, renders all the issues in the case *res judicata*, and constitutes a bar to any subsequent suit for the same cause of action. Hence when a court dismisses a suit upon some ground which does not go to the merits of the action, but leaves them open to consideration in another court, or at another time, or in another way, the decree of dismissal must expressly adjudge that it is rendered for the specific reason upon which it is based, or must expressly provide that it is made without prejudice."
>
> *Hickey* v. *Johnson* (8 CCA), 9 Fed. (2) 498, 501.

(b) Phoenix was represented by the trustees as to the claimed obligations of the bridge company to Phoenix. Whether called "underlying obligations" or just "obligations" is immaterial. It designates the same claimed debts put forward as considerations for the bonds and now put forward in the Delaware cases.

Not only was the action instituted at the request and instigation of Phoenix and carried on under its direction by attorneys of its selection at its expense, but the trust deed expressly authorized the trustees to represent it as to the claimed indebtedness.

Article 5, Section 10 of the trust deed (F.R. 41-42) provided:

> "and in case the company shall fail to pay the same forthwith upon such demand, the trustees in their own names, and as trustees of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid.
>
> "The trustees shall be entitled to recover judgment as aforesaid, *either before* or *after* or *during* the pendency of any proceeding for the enforcement of the lien of this indenture upon the trust property, and the right of the trustees to recover such judgment shall not be affected by any sale hereunder, or by the exercise of any other right, power or remedy for the enforcement of the provisions of this indenture, or for the foreclosure of the lien hereof; * * *"

In the case of *McPherson* v. *Commercial Building & Securities Co.*, 206 Iowa 562, 218 N. W. 306, the court said:

> "In the deed of trust set forth in the petition, the trustee was the pledgee of the securities, and was the proper representative of all the bondholders, with full power both under the trust deed and under the statute, Sections 12364-12371, Code 1924. Plaintiff's bond carried the written attestation of the trustee. *There was no lack of privity as between the holder of the bond and such trustee.*" (Emphasis supplied.)

Section 10968 of the Code of Iowa of 1931, 1935 and 1939 provides:

> "Plaintiff as legal representative. An executor or administrator, a guardian, a trustee of an express trust, a party with whom or in whose name a con-

tract is made for the benefit of another, or party expressly authorized by statute, may sue in his own name, without joining with him the party for whose benefit the action is prosecuted."

Equity Rule 37, 28 U.S.C.A., following Section 723, provides:

"Every action shall be prosecuted in the name of the real party in interest, but an executor * * * trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another * * * may sue in his own name without joining with him the party for whose benefit the action is brought."

Equity Rule 10 as amended May 4, 1925, 28 U.S.C.A., following Section 723, provides:

"In suits for the foreclosure of mortgages or for the enforcement of other liens a decree may be rendered for any balance found to be due over and above the proceeds of the sale or sales; and execution may issue for the collection of the same as is provided in rule 8 when the decree is solely for the payment of money. Such a deficiency decree may be so rendered and enforced whether the plaintiff owns the debt or is a trustee or agent for another or others who own it, as often is true when the debt is evidenced by notes or bonds. Where the plaintiff is such trustee or agent, any money collected on the execution shall be paid to him as such representative, and he shall pay it to the owner of the debt if there be only one, and if there be more shall distribute it *pro rata* among them according to their respective interests."

Petitioner cites *Mackay* v. *Randolph Coal Company* (8 CCA, decided May 4, 1910), 178 Fed. 881. That case

involved a question of merger and was decided under the earlier equity rules, which were amended before the trial of the present case as above set forth, and that case is not now an authority for the proposition for which it is cited.

In *Lane* v. *Equitable Trust Company of New York* (Nov. 24, 1919, 8 CCA), 262 Fed. 918, cert. den. 252 U. S. 578, wherein the mortgage deed of trust, securing the bonds, contained the same provisions as those in the instant case, quoted above, the court held that the complainant trustee was entitled to a deficiency judgment to pay the indebtedness secured by the deed of trust.

Also see:

Fidelity Philadelphia T. Co. v. *Hale-Kilbourn Corp.* (Sept. 16, 1937), 24 Fed. Supp. 3, 11.
Hartford Acc. Ins. Co. v. *Southern Pac. Co.*, 273 U. S. 207, 47 S. Ct. 357, at 360.

Petitioner cites the case of *Iowa Title & Loan Co.* v. *Clark Bros., et al.*, 213 Iowa 875, 237 N. W. 336. In that case there were a series of notes secured by the same mortgage and the court held that one or more of the note owners might sue and recover at law and later enforce the mortgage lien, while holders of other notes might in the first instance avail themselves of their remedy by foreclosure. But that is not what the petitioner did in the instant case. Here Phoenix procured a fraudulent deed of trust, securing the bonds, and the claimed considerations thereof, covering every item of property owned by the bridge company, adopting that as its weapon. The case does not hold that a person may have trustee proceed with the foreclosure of a mortgage or deed of trust to recover the claimed debt secured thereby, and having been defeated on the ground that there was

no consideration and no debt existed, proceed to sue again on the same pretended indebtedness, nor does it hold that a person may sue on notes and having been defeated on the ground that there was no consideration, that he may then sue in the name of trustees for the foreclosure of a mortgage claimed to secure the same notes.

In *Iowa Title & Loan Co.* v. *Clark,* 215 Iowa 929, 247 N. W. 211, in which under a trust agreement giving to the trustee powers similar to but not as elaborately stated as the powers set forth in the trust deed in this case, the trustee brought one action to foreclose a mortgage as to certain of the notes for which the mortgage was security, and an action at law to recover upon the remaining notes. The Iowa court specifically held that the owners of the notes having constituted the plaintiff their trustee to enforce collection of the debt represented by the notes, and the Iowa law (Section 10968, Codes 1927 and 1931) providing that a trustee of an express trust * * * may sue in his own name without joining with him the party for whose benefit the action is prosecuted, the right to prosecute the action on the notes was in the trustee, and stated:

> "Under our statute the plaintiff, as such trustee of an express trust, had authority to bring action against the defendants in its own name without joining with it the beneficial owners of the notes. Aside from its duty as trustee to distribute the proceeds of the trust fund to those entitled thereto, the plaintiff was in no different position than if it were prosecuting this action as the absolute owner of the notes."

Petitioner cites a fraudulent conveyance case, *Clemens* v. *Elder, et al.,* 9 Iowa 272, wherein Elder conveyed lands

to James H. Grower and received a bond for the reconveyance of the same upon the payment of $3,750.00 within one year as evidenced by two notes payable to J. H. Grower Bros. & Co., and an action was brought to set aside this deed as a fraudulent conveyance and it appears that James H. Grower in fact held the title for the firm to which the notes were payable, or their endorsers, or both, none of whom were made parties. The court held the proper parties had not been made defendants. In that case there was no trust deed such as in the instant case authorizing the trustee to represent all parties interested. That case has no similarity in facts to the case at bar and obviously is not an authority for the proposition for which petitioner cites it.

Petitioner cites *Miller* v. *Mahaffy,* 45 Iowa 289, wherein plaintiffs claimed to be the owners of land by virtue of written contract with the Burlington & Missouri R. R. Co.; that said contract of purchase was taken in the name of Robert Miller, and that he held the title as trustee for plaintiffs and not as owner, and that he fraudulently assigned the contract to defendant Mahaffy, who had knowledge thereof, and there was evidence tending to show that plaintiffs and Miller owned this land in common; that the sale to Mahaffy was not without consideration. Miller, although named as a party defendant, had not been served with notice of the action. The court held that under such circumstances there was a defect of parties, and that the court could not proceed at all until Miller was made a party. There was no instrument by virtue of which Mahaffy might act for Miller in the protection of his interests, and the case is not an authority for petitioner's contention as to representation.

Petitioner cites *Central Trust Co.* v. *California and N. R. Co.* (C.C.N.D. Cal., 1910), 110 Fed. 70. That case involved the right of individual bondholders in a suit by a trustee to foreclose a mortgage securing bonds to intervene for the purpose of contesting the validity of certain bonds, no answer having been filed by the defendant railroad company. There should be added to petitioner's quotation from the decision just ahead of it: "The objection that the intervener, Chas. H. Smith, is not legally or equitably entitled to intervene in this action as against the other bondholders cannot be sustained." And added to the end of the quotation: "An intervention is permissible and proper in such case, for the reason that the interests of the trustee and the intervening bondholder have ceased to be identical." In the instant case no exception was ever raised to the action or want of action of the trustees. On the contrary, the record in this case discloses that the trustees promptly at the request of Phoenix filed the original bill and thereafter appeared by counsel of Phoenix' selection and prosecuted the suit at all times and stages diligently. They did everything that Phoenix wanted them to do.

In this connection see *McPherson* v. *Commercial Building and Securities Co., et al.*, 206 Iowa 562, 218 N. W. 306.

In the case of *Kerrison* v. *Stewart*, 3 Otto 155, it was held:

> "Where a trustee represents his beneficiaries in all things relating to the trust property, they are not necessary parties to a suit against him by a stranger to *enforce or declare void the trust.*"

The court said:

> "In such casse the trustee is in court for and on behalf of the beneficiaries, and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party. * * * The principle which underlies this has always been applied in proceedings relating to railway mortgages, where a trustee holds the security for the benefit of bondholders. It is not, as seems to be supposed by the counsel for the appellants, a new principle developed by the necessity of that class of cases, but an old one, long in use in analogous cases, and found to be well adapted to the protection of the rights of those interested in such securities."

In *Mercantile Trust Co.* v. *Schlafly* (CCA 8), 299 Fed. 202, which was a suit by a trustee in bankruptcy against a trustee under a mortgage securing bonds to recover money collected by defendant for interest on bonds within four months prior to bankruptcy, and not disbursed to the bondholders, it was claimed that the bondholders were necessary parties. The court held that they were not; that they were all represented by the trustee.

In *Beals* v. *Ill. M. & T. R. R. Co.*, 133 U. S. 290, the court said:

> "Upon the facts thus established no ground is shown for maintaining the bill. The former judgment was rendered by a court of competent jurisdiction, in which not only the railroad company that issued the bonds, but the surviving trustee under the mortgage, made in the name of another company to secure payment of the bonds, were made parties. *The bondholders were thus fully represented in that suit, and bound by the decree, cancelling and annulling the bonds and mortgage.*"

In *Elwell* v. *Fosdick,* 134 U. S. 500, where a decree had been entered and a sale made and confirmed in a suit to foreclose a first mortgage on a railroad, in which the trustee under second mortgage was made a party, and a release of errors in the proceeding executed by such trustee, the court said:

> "The trustee represented the bondholders not only in the proceedings which resulted in the entry of the decree, so that the bondholders were not necessary parties, but he bound them by his release of errors."

To the same effect see *Manson* v. *Duncanson,* 166 U. S. 533.

In *Heckman* v. *United States,* 224 U. S. 413, the court said:

> "But if the United States representing the owners of restricted lands, is entitled to bring a suit of this character, it must follow that the decree will bind not only the United States, but the Indians whom it represents in the litigation. This consequence is involved in the representation. (Citing authorities.) And it could not, consistently, with any principle, be tolerated that, after the United States, on behalf of its wards, had invoked the jurisdiction of its courts to cancel conveyances in violation of the restrictions prescribed by Congress, those wards should themselves be permitted to relitigate the question."

On the issues of fraud, conspiracy, invalidity and want of consideration, Phoenix, as well as the other bondholders, were represented by the trustees.

In the case of *Richter* v. *Jerome,* 123 U. S. 233, 246, the court said:

"Something is also said in the argument about the equitable claims of the bondholders upon Ayer as the successor of Anthony, growing out of the false representations made to them as to the title of the lands covered by the mortgage when they paid the money and took the bonds; but as all such claims come from the mortgage, as to which, in all proceedings for foreclosure, they are represented by their trustees when its interests are not in conflict with theirs, all the equities now asserted were proper subjects for adjudication in the former suit, if they existed. They formed part and parcel of the security which was then foreclosed."

Thompson and his associates controlled Phoenix and dominated and controlled the bridge company and were common directors of Phoenix and of the bridge company and he was a dominating influence and character therein (F.R. 188), and the burden was on complainants to show the fairness of the bond transactions and adequacy of consideration.

Geddes v. *Anaconda Copper Co.*, 254 U. S. 590.
Corsicana Natl. Bank v. *Johnson*, 251 U. S. 68.

The petition of intervention charged fraud and illegality and want of consideration, and it is well settled that where that appears in an issue or sale of bonds or coupons the mere possession of the paper under such circumstances is not sufficient. Proof must be offered as to actual considerations.

Thompson on Corporations, Vol. 3, sec. 2289, p. 216, at bottom p. 217, top p. 218.

Phoenix saw to it that it was well represented by the trustees. It filed exceptions (F.R. Supp. 14-58) setting forth in detail every claimed underlying and antecedent

debt as considerations for the bonds, which included every claimed consideration involved in the present Delaware actions and the mortgage involved herein; and it had the trustees in their exceptions adopt Phoenix' exceptions. Trustees' exception number two (F.R. Supp. 7) contained:

> "To avoid unnecessary duplication and consequent burden upon the court, complainant trustees do hereby expressly adopt each and every of the exceptions filed herein on behalf of Phoenix Finance Corporation to the same effect as if such exceptions were fully set forth," etc.

The trustees in their motion for dismissal and in the alternative petition for rehearing verified by Thompson, president of Phoenix, also adopted Phoenix' petition for rehearing and in the alternative for modification of decree (F.R. 214) wherein and in the affidavits thereto attached all the claimed underlying considerations were again asserted as considerations for the bonds and mortgage. (F.R. 216-391, especially 216, 223, 230, 236, 308, 340, 355 to 364.)

The trial court determined the questions of consideration presented in accordance with *Thomas* v. *Brownville, etc., R. Co.*, 109 U. S. 522.

In *Souffront* v. *La Compagnie Des Sucreries, etc.*, 217 U. S. 495, 54 L. ed. 856, 30 S. Ct. 608, 612, this court said:

> "The persons for whose benefit, to the knowledge of the court and of all parties to the record, litigation is being conducted, cannot, in a legal sense, be said to be strangers to the cause. The case is within the principle that one who prosecutes or defends a suit in the name of another, to establish and protect his own right, or who assists in the prosecu-

tion or defense of an action in aid of some interest of his own, and who does this openly, to the knowledge of the opposing party, is as much bound by the judgment, and as fully entitled to avail himself of it, as an estoppel against an adversary party as he would be if he had been a party to the record. *Lovejoy* v. *Murray*, 3 Wall. 1, 18 L. ed. 129."

See:

Anderson v. *Watt*, 138 U. S. 694, 704, 705.
Robbins v. *Chicago City*, 4 Wall. 657, 71 U. S. 657.
Lovejoy v. *Murray*, 3 Wall 1, 70 U. S. 1, 19.
Hoskins v. *Hotel Randolph Co.*, 203 Iowa 1152, 211 N. W. 423.
Fulsom v. *Quaker Oil & Gas Co.* (8 CCA), 35 Fed. (2) 84, 90.
Louisville & Nashville Ry. Co. v. *A. L. Schmidt*, 177 U. S. 230.
Stoddard v. *Thompson*, 31 Iowa 80, 82.
Schroeder v. *State Bank*, 144 Iowa 42.
Plumb v. *Crane, Adm'r, etc., supra*, 123 U. S. 560.

Phoenix was well represented. It was not only represented by the trustees, but through its president, Thompson, and associates, controlled the bridge company, defendant (F.R. 129). And on that ground the court made an order granting leave for the filing of petition of intervention by Kendrick on behalf of stockholders (F.R. 82, 85 to 86). Both the court and Master found that the bridge company was not making and would not have made a good faith defense to the complainant's action had not interveners intervened (F.R. 134 and 183).

Phoenix was made an ancillary party. The court having acquired jurisdiction between the original parties it appointed a receiver of all the property of the Iowa-Wisconsin Bridge Company and the property was in the

actual custody of the court (F.R. 68-72). That drew to it the right to decide all conflicting claims to its ultimate possession and control, all persons claiming to be entitled to participate therein might come in or be brought in under the jurisdiction acquired between the original parties ancillary to the original proceedings. At that Point the Phoenix was made a party (F.R. 85 to 88).

In *First Trust & Savings Bank* v. *Iowa-Wisconsin Bridge Company*, 98 Fed. (2) 416 at 421, cer. den. 305 U. S. 650, rehearing denied, 305 U. S. 676, the court in its opinion (F.R. 1689 at 1694 said:

> "Further, if the controversy between the two Delaware corporations should in any way be considered as a separate controversy involving only the validity of certain of the bonds, then it was ancillary to the foreclosure proceeding, and jurisdiction attached irrespective of citizenship, because the subject matter had been drawn into the federal court under the receivership before Phoenix became a party. (Cases cited.) The court did not err in overruling appellants' attack on the jurisdiction."

That ancillary parties are bound by the decrees and orders of the court is well established.

(c) The court had full and complete jurisdiction in equity to determine the matters involved in this cause.

The whole case was one of equitable cognizance. The equitable jurisdiction was invoked by the filing of the bill of foreclosure. An accounting was involved. It was referred to a Master by consent of the parties. Where a court of equity has obtained jurisdiction over some portion of a controversy, it has jurisdiction and

will proceed to decide the whole controversy and award complete relief, even where the rights of parties are strictly legal and the final remedy granted is of a kind that might have been conferred by a court of law.

All the matters covered by the court's injunction were fully litigated on the original hearing before the Master, before the court and on appeal before the Circuit Court of Appeals. Instead of presenting any such question as now claimed by Phoenix before the trial court, trustees and Phoenix presented the claimed considerations of Phoenix for bonds for adjudication and re-asserted them before the Circuit Court of Appeals. By failing to raise such question before the trial court it was waived, if it existed in the case, and it is too late now for Phoenix to raise such question in this ancillary proceeding for the first time in its petition for certiorari in the Supreme Court. It was never raised before, not even on the appeal from the final decree of injunction to the Circuit Court of Appeals. (Phoenix' statement of points on appeal R. 732-734; 115 Fed. (2) 1.)

Hartford Accident and Indemnity Co. v. *Southern Pac. R. R. Co.*, 273 U. S. 207.
Duignan v. *U. S.*, 274 U. S. 195.
Kilbourn, et al., v. *Sunderland, et al.*, 130 U. S. 505.
Perego v. *Dodge, et al.*, 163 U. S. 160.
People of Porto Rico v. *Livingston* (1 CCA), 47 Fed. (2) 712.
McGowan v. *Parish*, 237 U. S. 285.

The decision in the case of *Toucey* v. *New York Life Insurance Co.* (8 CCA), 102 Fed. (2) 16, cited by petitioner, is not against, but on the contrary supports the above proposition.

In *Armour & Co.* v. *Miller* (8 CCA), 91 Fed. (2) 521, the court said:

> "It is, of course, well settled that a court of equity having acquired jurisdiction of the subject-matter of a suit will retain such jurisdiction for all purposes, and adjudicate all disputed rights of the parties arising out of such subject-matter, and this too, notwithstanding some of such rights may sound at law (citing authorities and equity rules); indeed it is its duty to do so, and 'not remit any part of (the controversy) to a court of law' (citing authorities). And in cases such as the suit of Storley, damages may be adjudged down to the date of the trial."

Code Section 12372 of the Code of Iowa of 1931, 1935 and 1939 provides:

> "Equitable Proceedings. No deed of trust or mortgage of real estate shall be foreclosed in any other manner than by action in court by equitable proceedings."

Code Section 12373 of the Code of Iowa of 1931, 1935 and 1939 provides:

> "Deeds of Trust. Deeds of trust of real property may be executed as securities for the performance of contracts, and shall be considered as, and foreclosed like, mortgages."

In *Deaton* v. *Hollingshead,* 225 Iowa 967, 282 N. W. 329, the court, in discussing the nature of a foreclosure action, said:

> "Code Section 12372 provides that a mortgage of real estate shall be foreclosed by equitable proceedings. Plaintiff in the foreclosure suit selected the equity forum for the adjudication of his rights and

> prayed, not only for a money judgment, but also for foreclosure of the mortgage and appointment of a receiver. The court of equity had jurisdiction of the controversy and parties, and the action having been properly brought in equity, all issues, *legal and equitable,* are triable therein, and the court will determine the entire controversy." (Emphasis supplied.)

Petitioner's statement in its brief, bottom page 74, top page 75, is a misstatement of the record. Respondent's supplemental and ancillary bill below (R. 3) contained such statement and the District Court's finding number four on preliminary injunction (R. 121) contained such statement, but such statement was limited and confined by the court's finding number nine, paragraph (f) (R. 127), in which he excepted therefrom the "toll ticket case" pending in Delaware and defenses thereto. In the court's findings on permanent injunction that finding was eliminated, and the court in its finding number four on permanent injunction found that on the first day of December, 1936, the court filed its opinion, findings of fact and final decree, which was made a part of the record (R. 705). And also in its finding number nine, paragraph (f), excepted the "toll ticket case" (R. 711). And excepted the toll ticket case from its conclusions of law (R. 714). And in its final decree did not enjoin that case (R. 719-722).

Phoenix was already represented in the lawsuit by the trustees with all the pleadings applying. It filed answer to the petition of intervention and all the pleadings applied to it, and it cannot now assail collaterally the decrees and orders made on a question of pleading.

> *Corcoran* v. *Chesapeake & Ohio Canal Co.,* 4 Otto 741, 24 L. ed. 190.

Himes v. *Smith* (6 CCA), 270 Fed. 132, cert. den. 255 U. S. 576.
Davis v. *Zirkle*, 80 Ind. A. 396, 138 N. E. 266.
Nome & Snook v. *Ames Merc. Co.* (9 CCA), 187 Fed. 928.
Crary v. *Kurtz*, 132 Ia. 105, 107, 105 N. W. 590.
Bell v. *Corbin*, 136 Ind. 269, 36 N. E. 23.
Louisville, etc., Const. Co. v. *Utz*, 133 Ind. 265, 32 N. E. 881.
34 Corpus Juris, Sec. 1410, p. 993.

(d) All the controversies involved in the supplemental and ancillary bill were within the issues. All such matters were controverted and litigated.

The case of *Reynolds, et al.* v. *Stockton*, 140 U. S. 254, cited by petitioner, bears no similarity to the instant case. The case is similar to the class of cases where the plaintiff by his notice and pleadings asks for certain relief, and then on default or after answer, without further legal notice and without amendment, takes judgment based on different grounds than those alleged and for a wholly different amount in the absence of the defendant. The court in the opinion states:

> "Nor are we concerned with the question as to the rule which obtains in a case in which, while the matter determined was not, in fact, put in issue by the pleadings, it is apparent from the record that the defeated party was present at the trial and actually litigated that matter. • • • Here there was no appearance after the filing of the answer and no participation in the trial or other proceedings."

The case of *Union Central Life Ins. Co.* v. *Drake*, 214 Fed. 536, cited by petitioner, supports the position of respondent. The language quoted by petitioner refers to situations where the *second suit* is upon a different cause

of action and the sentence quoted, standing alone, is not a correct summary of the decision. The court says in the following sentence:

> "Moreover, the test of identity of causes of action is the identity of the facts essential to maintain them."

In the foreclosure action, in view of the defense of want of consideration for the bonds, it was indispensable to the maintenance of the suit of complainants that they establish consideration. In the Delaware suits (without reference to the defense of *res judicata*) proof of consideration is indispensable to a right of recovery.

Courts are not limited to the pleadings and the decree in order to determine the issues of a former case and the effect of the adjudication thereof.

> Freeman on Judgments (5th Ed.), Vol. 2, Sec. 765, pp. 1618, 1620.
> Freeman on Judgments (5th Ed.), Vol. 2, Sec. 769, p. 1630 and Sec. 771, p. 1638.
> 34 Corpus Juris, Sec. 1329, p. 921.

State of Oklahoma v. *State of Texas*, 256 U. S. 70, 88, in which the court said:

> "What was involved and determined in the former suit is to be tested by an examination of the record and proceedings therein, including the pleadings, the evidence submitted, the respective contentions of the parties and the findings and opinion of the court."

Also see:

> *National, etc., Co.* v. *Oconto*, 183 U. S. 216.
> *Sampson* v. *Jump*, 188 Iowa 528, 175 N. W. 318.

Millie Mining Co. v. *McKennie* (6 CCA), 172 Fed. 42.
Loeb v. *Columbia Township Trustees*, 179 U. U. 472, 481.

"Where the judgment or decree in a case has been reviewed on appeal or the decision or judgment of an appellate court is relied upon as *res judicata*, the opinion of the court and the record in the case may be examined to determine what was adjudicated, and whether the adjudication was on the merits. A bill of exceptions or statement for purposes of appeal may be looked to."

Freeman on Judgments (5th Ed.), Vol. 2, Sec. 772, p. 1642.

(e) Doctrine of *res judicata* does not depend upon affirmance and denial of a particular proposition in the pleadings of the former suit, but on the fact that the proposition has been fully and finally investigated and tried.

In *King City, Mo., for use and benefit of United States Cast Iron Pipe and Foundry Co.* v. *Southern Surety Company* (Sept. 29, 1931), 212 Iowa 1230, 238 N. W. 93, wherein the federal court had entered judgment denying material man's recovery on contractor's bond, it was held *res judicata* of a suit by city for benefit of material man to recover on same bond and of legal issues as to effect of bond as well as equitable issues regarding reformation of bond. The court said:

"This court is committed to the doctrine that *res adjudicata* does not rest upon the fact that a particular proposition has been affirmed and denied in the pleadings of the former suit, but upon the fact that it has been fully and fairly investigated and

tried therein. See *Reynolds* v. *Lyon County,* 121 Iowa 733, 96 N. W. 1096, 1099. We there said: 'The prevailing rule is so well expressed in Black on Judgments No. 614, that we quote with approval: "The doctrine of *res judicata* does not rest upon the fact that a particular proposition has been affirmed and denied in the pleadings, but upon the fact that it has been fully and fairly investigated and tried; that the parties have had an adequate opportunity to say and prove all that they can in relation to it; that the minds of court and jury have been brought to bear upon it, and so it has been solemnly and finally adjudicated. Now, these conditions are fully met when any question, though foreign to the original issue, becomes the decisive question—the turning point—in the case. In that event it will receive just as full and exhaustive an examination as if it were the sole subject-matter of a distinct and independent suit, and therefore should be considered as much settled by the judgment as if it stood alone as the issue in the case. For these reasons, the more correct doctrine is that the estoppel covers the point which was actually litigated, and which actually determined the verdict of (or) finding, whether it was statedly and technically in issue or not." ' (Citing authority.)

"Matters which follow by necessary and inevitable inference from the judgment-findings or determinations of the court, in relation to the subject-matter of the suit which are necessarily implied from its final decision, as being determinations which it must have made in order to justify the judgment as rendered—are equally covered by the estoppel as if they were specifically found in so many words. See 34 C. J. 923.

"Applying the foregoing rules to the proposition confronting us, it seems quite clear that the plaintiff is estopped from maintaining the action now at-

tempted to be litigated, by the former adjudication of the federal court."

(f) The rule of the national courts and of the courts of Iowa as to what constitutes *res judicata* are the same.

Petitioner cites *Baltimore Ship Co.* v. *Phillips*, 274 U. S. 316. In that case the court said:

> "If upon the *same cause of action*, the judgment or decree upon the merits in the first case is an absolute bar to the subsequent action or suit *between the same parties or those in privity with them*, not only in respect of every matter which was actually offered and received to sustain the demand, but also as to every ground of recovery which might have been presented. But if the second case be upon a different cause of action the prior judgment or decree operates as an estoppel only as to matters actually in issue or *points controverted*, upon the determination of which the judgment or decree was rendered." (Emphasis supplied.)

The case of *Southern Pacific Ry. Co.* v. *U. S.*, 168 U. S. 1, cited by petitioner, holds nothing contrary to the position of respondent, but on the contrary fully supports its position, and there should be added to petitioner's quotation therefrom:

> "and, even if the second suit is for a different cause of action, *the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established*, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination.

> Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect to all matters properly put in issue, and actually determined by them."

In that case the court also said:

> "A judgment upon the merits constitutes an absolute bar to a subsequent suit upon the same cause of action *in respect to every matter offered and received in evidence or which might have been offered to sustain or defeat the claim in controversy.*" (Emphasis supplied.)

The other cases of the United States Supreme Court cited by petitioner also support respondent's position when complete statement therein contained is read in connection with the portion quoted by petitioner.

Also see:

Werlein v. *New Orleans,* 177 U. S. 390, 397, 20 S. Ct. 682, 685, 44 L. ed. 817.
Chicot County Drainage Dist. v. *Baxter State Bank,* 308 U. S. 371, 378.
Davis v. *Brown,* 94 U. S. 423.
Cromwell v. *County of Sac,* 94 U. S. 351.
Cornett v. *Williams,* 20 Wall. 226.
Spencer v. *Watkins* (8 CCA), 169 Fed. 378, cert. den. 215 U. S. 605.

In *Bagley* v. *Bates,* 223 Iowa 836, 273 N. W. 924, at 927, the court said:

> "It is the general rule of law that 'a judgment on the merits rendered in a former suit between the same parties or their privies, on the same cause of

action, by a court of competent jurisdiction, operates as an estoppel not only as to every matter which was offered and received to sustain or defeat the claim, but as to every *other matter which might with propriety have been litigated and determined in that action.* • • •

This is a well-established rule, of almost universal application, that a judgment, if rendered by a court of competent jurisdiction, on the merits, constitutes a complete bar and estoppel to a subsequent action between the same identical parties based upon the same claim or demand or cause of action. *This is not only true with reference to matters in issue, but it is true as to all matters incident to or essentially connected with the subject of the action which might have been put in issue and adjudicated.* This rule is so familiar it needs no citation of authorities to sustain it." (Emphasized in opinion.)

Also see *Rew* v. *School District*, 125 Iowa 28, 98 N. W. 802.

(g) A mortgage or deed of trust or pledge cannot exist without a pre-existing debt.

As said in Jones on Mortgages, 8th Ed., Sec. 316, at page 289:

"A debt, either pre-existing or created at the time, or contracted to be created, is an essential requisite of a mortgage. 'A mortgage is, in equity, a hypothecation or pledge of property for the security of a debt. There must be a debt, or there can be no security for its payment. Hence it is said, if there is no debt, there can be no mortgage. Debt, in this connection, means a duty or obligation to pay, for the enforcement of which an action will lie.'"

And in *Carpenter* v. *Longan*, 16 Wall. 271, it is said:

> "Upon bill of foreclosure * * * an account must be taken to ascertain the amount due upon the instrument secured by the mortgage. * * * The note and mortgage are inseparable; the former as essential, the latter as an incident. * * * The mortgage can have no separate existence. When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents."

See also:

Ariz. Copper Estate v. *Watts*, 237 F. 585.
Holladay v. *Willis*, 101 Va. 274, 43 S. E. 616.
Saunder v. *Dunn*, 175 Mass. 164, 55 N. E. 893.

The proposition finds another analogy in the law of pledges, which is that there can be no valid pledge of property unless there is a valid debt in existence which is to be secured by the pledged property. If there is no such valid debt then the pledge is invalid.

49 C. J., page 903, sec. 23 (Failure of Consideration).
Chapman v. *Sipe Springs First Nat. Bank*, 275 S. W. 498 (Tex.).
Stokes v. *Stokes*, 155 N. Y. 581, 50 N. E. 342.

The case of *Thomas* v. *Brownsville, etc., R. Co.*, 109 U. S. 522, is in point. In that case an action was filed for the foreclosure of an Indenture of Mortgage securing a bond issue. The bonds themselves were issued on account of a contract for the construction of the railroad. The court found as a fact that the bonds were invalid because the construction contract was fraudulent and therefore void. However, some of the bonds were held to be valid to the extent they could be supported by consideration, resulting from work, labor, and material fur-

nished by the contracting company. But the court pointed out that such partial validity of the bonds was not dependent upon the original obligation—the contract which had been declared void.

The case illustrates the fact that in a suit to foreclose a mortgage securing a bond issue the court may inquire into the consideration for the bonds, and will, if necessary, void the bonds if they are issued on account of void obligations. Necessarily in the Thomas case the court had to determine the validity of the underlying obligation.

(h) Successful defense to action on collateral bars an action on the debt.

The rule is stated as follows in 34 C. J., p. 953:

> "A successful defense on the merits in an action either on the principal debt or the collateral will bar an action on the other."

In support of this are cited, among other cases, *Johnson* v. *Forstall, et al.*, 3 La. Ann. 466, and *Sykes* v. *Gerber*, 98 Penn. Stat. 179.

In the last cited case there had been a suit on a promissory note, with judgment for defendant. An action was then commenced on the original debt. The court assumes that the note had not been given in payment of the debt but as security. The opinion then states:

> "The original claim and the note were by the same parties, for the same consideration and payment of either would have satisfied both. A judgment in favor of the creditor upon either would be a bar to a recovery on the other. And a judgment for the debtor in an action which finally disposed of the note for equally good reason is a complete defense

against a suit upon the account or claim which the note represented."

The situation as to the purported notes involved in the Delaware actions is exactly parallel. The $20,100.00 bonds were given as security for certain notes. There was and could be no consideration for them except the alleged indebtedness represented by the notes. When the court found that there was no consideration for the bonds, it necessarily found that there was no valid indebtedness and therefore no consideration for the notes representing the purported indebtedness.

The rule stated as quoted above from Corpus Juris is fully sustained by the Supreme Court of the United States in *Chew* v. *Brumagen*, 13 Wall. 497, 20 L. Ed. 663, in which the converse situation existed, *i. e.*, the original action was on the indebtedness and the second action an attempt to foreclose the mortgage. This case is also valuable authority on the proposition that where a trustee of an express trust brings an action the *cestui que trust* is bound by that judgment not only in the state where the judgment was rendered, but in all other states.

In that case a bond for $3,500.00 was secured by a mortgage. The bond was assigned by the obligee to another, who brought suit on it in the State of New York. A defense of fraud was interposed. A verdict was returned for the plaintiff, but for only $2,091.25. Judgment was entered for this amount and paid by the maker of the bond. The bond and mortgage were then assigned to a third party who attempted to foreclose the mortgage in the State of New Jersey. The mortgagor set up in defense the previous suit on the bond in New York, the judgment and the payment of the judgment, claiming that

the debt which the mortgage was given to secure was thereby satisfied, and consequently that the mortgage was satisfied. His plea of *res judicata* was rejected by the courts of New Jersey and an appeal taken to the Supreme Court of the United States.

With reference to the right of the trustee to sue, he being the only indispensable party, and as to a judgment in an action by him being binding upon his *cestui que trust*, the court cited the statute of the State of New York, which is practically identical to Code of Iowa 1935, Section 10968, cited by the Circuit Court of Appeals in this case, and held that neither the *cestui que trust* nor his personal representative was a necessary party to the suit brought upon the bond by the trustee. The court said:

> "They were represented by the trustee, and the judgment which he recovered settled finally against them, and claiming under them, as well as against Wood (the trustee) the amount recoverable."

The court further held that the judgment in the original suit determined finally the amount of the debt for which the bond was given and neither the *cestui que trust* nor his administratrix nor any subsequent assignee of either of them could maintain that the bond was not wholly extinguished in the judgment.

Also see *U. S.* v. *California & Oregon Land Co.*, 192 U. S. 355, 24 S. Ct. 266.

> *Beloit* v. *Morgan*, 7 Wall. 619, 19 L. ed. 205.
> *Thompson* v. *Roberts Bros.*, 24 How. 233.

In *Kenyon* v. *Wilson*, *The Same* v. *Baker*, 78 Iowa 408, the court said:

"The petitions in these cases are substantially alike. They allege that one Tramel, to secure a promissory note held by plaintiff, executed a chattel mortgage upon fifty steers, which was foreclosed in an action against Tramel, in which a personal judgment was entered against him, as well as a decree foreclosing the mortgage against defendants in these cases. It is alleged that each of the defendants, after the registry of the mortgage, had purchased portions of the cattle from the mortgagor. The decree of foreclosure contains no judgment against defendants, but directs that a special execution shall issue against all of the property mortgaged. But the defendants have disposed of the cattle held by them, converting the property to their own use. The defendant in each case pleads that the matters upon which plaintiff bases his claims against them are *res judicata*, having been involved in the original foreclosure proceedings.

"It is plain that the identical relief—a personal judgment against defendant—sought in these actions could have been recovered in the original foreclosure proceeding. * * *

"An adjudication is final and conclusive of all matters in a case which the parties could have presented to the court for adjudication in the case. The law hates a multiplicity of suits, and will not permit a plaintiff to split up his demands, presenting one at a time, in separate successive actions. He must litigate all matters growing out of his causes of action upon which a remedy may be sought in one action. *Thus he cannot seek a foreclosure of a mortgage in one action, and in a subsequent action ask for a personal judgment against the defendant. He could have recovered both remedies in the first action, and must be content with what he first recovers.*"

Also see *Schroeder* v. *Bank*, 144 Iowa 42.

(i) Petitioner's assertion that decisions of District Court and of the Circuit Court of Appeals are erroneous, in that indebtedness of Phoenix to bridge company could not be offset against bonds, is without merit.

It should be a sufficient answer to say that appellants having litigated the question of consideration for the bonds and the court having jurisdiction of the subject matter and of the parties any claimed error in the decision could only be reviewed on appeal, and that unless modified on appeal the decision is final, even if it were erroneous. 34 C. J., p. 901, Section 1311.

American Express Co. v. *Mullens*, 212 U. S. 311, 29 S. Ct. 381.
Last v. *Woolworth*, 150 U. S. 401.

Petitioner on former appeal claimed that the decree was "broader than the pleadings and issues" (Assignment of error 59, F.R. 256).

However, the trial court and the Circuit Court properly considered the matter of Phoenix' indebtedness to the bridge company and determined whether there was any consideration of any kind for the notes, the Kramer & Hogg item of $9,000 and the bonds in question.

John A. Thompson, president of the Phoenix Finance Corporation, was also president of the bridge company, and he and other directors of Phoenix Finance Corporation, who were also directors of the bridge company, controlled and dominated the bridge company (F.R. 188), and at the time of the alleged payments and the execution of the alleged notes and at the time of the delivery of the bonds, they were in duty bound merely to credit any payments claimed to have been made by Phoenix to or for

the bridge company on the amount due the bridge company from Phoenix.

The relation of directors to corporations is of such a fiduciary nature that transactions between corporations having common directors are regarded as zealously by the law as are personal dealings between a director and his corporation, and where such transactions are challenged, the burden is upon those who would maintain them to show their entire fairness and where a sale is involved, *the adequacy of consideration. Especially is this true where a common director is a dominating influence or character* (*as the court found here*) (F.R. 188).

The Supreme Court of the United States, in *Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590, said:

> "This court has been consistently emphatic in the application of this rule, which it has declared is founded in the soundest morality, and we now add the soundest business policy."

Such transactions are presumptively fraudulent.

Thompson and his controlled Phoenix, dominating and controlling the bridge company, owed a fiduciary duty to the bridge company, in the performance of which the law forbade them to take any notes and then bonds as collateral thereto for any payments claimed to have been made by Phoenix to the bridge company or for it while Phoenix was indebted to the bridge company in a far greater amount, and having acted in a dual capacity the notes and bonds were presumptively fraudulent.

In Vol. 3, Thompson on Corp., pp. 217, 218, Sec. 2289, it is said:

"But the rule is also well settled that where, under proper pleadings, fraud or illegality in the issue or sale of such bonds or coupons has been shown, then the holder or indorsee, before he is entitled to recover, must prove that he is a holder for value; *and the mere possession of the paper* under such circumstances is *not sufficient.* The reason of this rule is that the proof that the instrument was unlawful or fraudulently issued overcomes the presumption of the *good faith* on the part of the holder, and then casts upon him the *burden* of proving that he was a purchaser for value before maturity and without notice of any defense * * *."

Full inquiry and examination was made by the court as to the claimed underlying considerations of the notes, said $9,000.00 item and the bonds in question. All the evidence bearing thereon was presented and analyzed in detail, and from it the court found that there in fact was no consideration for the notes nor for the $9,000.00 Kramer & Hogg item, nor for the bonds; that Phoenix in fact at the time of the payments claimed as consideration therefor was indebted to the bridge company in a far greater amount; $14,000.00 represented by stock turned over to Phoenix on the fraudulent guaranty contract, the Wilder items, the Thompson commissions and the Thompson worthless notes and other items and that in law any payments made by it were merely a partial payment of the indebtedness to the bridge company and that no consideration existed for the above items (F.R., 156-204, especially 177 and 204).

Such matters could be considered as defensive and it was not necessary that they be pleaded. The petition of intervention was sufficient for that purpose and the items have been fully litigated.

In 57 C. J., p. 389, Sec. 40:

> "Although the matter could not be interposed as a set-off because no action could be maintained thereon it may still be available by way of defense."

In 49 C. J., p. 310, Sec. 380:

> "Where matter relied upon is strictly a defense in whole or in part to plaintiff's cause of action, it need not be set up as a cross demand."

Want of consideration was involved. *The question was not as to whether any consideration had passed from the trustees to the bridge company, but whether any consideration had passed from Phoenix to the bridge company*, and, therefore, it was necessary in determining that question to determine whether at the time the notes were given and the Kramer & Hogg item claimed to have been paid and at the time the bonds were issued, there was, in fact, any indebtedness from the bridge company to Phoenix. It was not claimed in this case that there was any consideration from the trustees but the trustees and Phoenix, defendant to the petition of intervention, claimed that there were considerations from Phoenix to the bridge company. Insofar as the bonds and their claimed underlying considerations were concerned, the defense was that even if Phoenix paid any items to or for the bridge company, nevertheless, on the other hand, prior to the payment of any such items, Phoenix had become indebted to the bridge company in a sum far in excess of the amounts of the claimed underlying considerations of the notes and of any other item paid by Phoenix to or for the bridge company and that, therefore, in fact, when the notes were given, there was no actual consideration owing to Phoenix which would stand as a consideration for the

notes, or for the bonds issued as collateral to them, nor as consideration for any of the other bonds issued to the Phoenix.

The case was before a court of equity. The intervener, appearing for the defendant, as a part of its prayer, had asked for general equitable relief. A similar prayer had been made by trustees and Phoenix; a court of equity, or a court possessing equitable jurisdiction, has inherent power as a part of its general jurisdiction to allow or compel a set-off independent of statute. 57 C. J. 361; *Scott* v. *Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059. The right to set-off, formerly regarded as attaching to the remedy only and not to the debt itself, is now recognized, particularly by the federal courts, as a matter of substantive justice affecting substantive relations between the parties. *The Gloria*, 286 Fed. 188, 192; Questions of CCA answered 266 U. S. 328, 45 S. Ct. 112, 69 L. Ed. 313.

In the federal courts set-off is not confined to matters arising out of the contract or transaction sued on. *Central Appliance Co.* v. *Buchanan* (CCA 6th), 90 Fed. 454 (opinion by Judge Lurton, concurred in by Judge Taft).

It would be impossible in any case, and so it was here, to determine the question of consideration for bonds without considering the relations between the defendant and the parties to whom the bonds had been issued.

The rule in Delaware and other states as to the necessity of affirmatively pleading set-off has no application to equitable action in the federal courts and particularly so when the set-off is treated as a defense.

In concluding this point of our brief it is perhaps advisable to refer briefly to the cases cited by appellant on pages 66-67 of its brief. To take these cases up one by one would serve no purpose; it suffices to say that they have no bearing upon the case at bar. Despite the statement of counsel for appellant that set-off must be pleaded in equity to be availed of as a defense, no case has been cited so holding. Appellant's counsel in citing Woolley on Delaware Practice and other authorities seems to have lost sight of the fact that the bridge case in Iowa was an action in equity and not at law. These authorities may, therefore, be dismissed without comment as not at all pertinent.

(j) The Delaware Superior Court erred in undertaking to review the findings of the federal court and its conclusions were erroneous.

Petitioner refers to the opinion of the trial court in the Delaware action involving the $3125 and the $2000 notes. This was filed after the trial and submission of the hearing on permanent injunction herein and the federal court's order approving supersedeas bond as modified provides that the petitioner is to dismiss that and other actions and to satisfy any judgment rendered therein if the instant case is affirmed. The question here involved is the federal court's findings and final decree and the correctness thereof. The decision of the Superior Court of Delaware at the time of the submission of this cause was not in existence, and is not a part of this record.

The learned Delaware court, in its opinion, referring to the $3,125 note, which the Master allowed, states:

> "This conclusion of the validity of the note was not changed by the decree of the court overruling the master upon this point."

The federal trial court held:

> "This conclusion of law is attacked in the defendants' and interveners' eighth exception. I think that insofar as the language of the master's conclusion includes the $9,000 of bonds held valid in the hands of Phoenix Finance Corporation and the $3,125 in bonds held valid in the hands of Phoenix Finance Corporation, it is erroneous" (F.R. 177-178).

and the court in its decree held:

> "that all bonds are without valid consideration with the exception,"

then specifying $15,000 of bonds held by others (F.R., 203-204).

The Delaware court then makes a statement at variance with the federal trial court's findings numbers 8 and 41 (F.R. 185 and 202), that Phoenix Finance Corporation was the successor in interest of the Phoenix Finance System, Inc., and subject to all defenses and offsets to which said Phoenix Finance System was at any time subject. We contend the Delaware court was in error in undertaking to review the federal court's findings.

The Delaware court erred in its statement:

> "In this case we are not directly concerned with the question as to whether the representation of a bondholder by a trustee includes an inquiry as to the validity of the bonds themselves, or at what stage of the proceeding such inquiry should be had. No

such question is here presented, for we are in no way interested in the bonds, as such" (App. Br., p. 53).

The judge writing the opinion then states that the conclusion in the court's opinion is not inconsistent with *Kerrison* v. *Stewart, supra; Mercantile Trust Co.* v. *Schafely, supra; Richter* v. *Jerome, supra; Beals* v. *Illinois & C. R. R. Co., supra,* or *Elwell* v. *Fosdick, supra.*

That the Delaware court wholly misconstrued those decisions and others of this court cited herein, in the light of the provisions of sections 10 and 13 of the trust indenture, heretofore quoted, is apparent from an examination of the authorities cited. And it is apparent that they overlooked the decision of the circuit court in *Lane* v. *Equitable Trust Co. of N. Y.* (8 CCA), 262 Fed. 918.

The Delaware court, in its opinion, states:

> "When, however, the sole matter before the adjudicating tribunal relates to the collateral itself and not to the antecedent debt, and the only parties before the court are connected with the collateral, and not with the antecedent debt, we think the principle fails of application and the invalidity of the collateral does not necessarily destroy the validity of the underlying indebtedness."

But the record shows that the parties before the court were not only connected with the collateral but also with the claimed antecedent debt. There could be no basis for the collateral without the claimed antecedent debt. The claimed underlying consideration of the notes was directly urged upon the trial court and this court as a consideration for the bonds in Phoenix' exception number 6 (Phoenix' exception No. 6, F.R., Supp., pp. 48-49).

The learned Delaware Superior Court, instead of giving full credit and effect to the decisions of the United States District Court and of the Eighth Circuit Court of Appeals in its decision proceeded to state conclusions of its own as to the facts determined by such decisions.

In *Deposit Bank of Frankfort, plff. in error* v. *Board of Councilmen of the City of Frankfort,* 191 U. S. 499, this court said:

> "* * * The doctrine of estoppel by judgment is founded upon the proposition that all controversies and contentions involved are set at rest by a judgment or decree lawfully rendered, *which, in its terms, embodied a settlement of the rights of the parties.* It would undermine the foundation of the principle upon which it is based if the court might inquire into and reverse the reasons which led the court to make the judgment. In such case nothing would be set at rest by the decree, but the matter supposed to be finally adjudicated, and concerning which the parties had had their day in court, could be reopened and examined, and if the reasons stated were, in the judgment of the court before which the estoppel is pleaded, insufficient, a new judgment could be rendered because of these divergent views, and the whole matter would be at large. In other words, nothing would be settled, and the judgment, unreversed, instead of having the effect of forever settling the rights of the parties, would be but an idle ceremony. We are unable to find reason or authority supporting the proposition that, because a judgment may have been given for wrong reasons, or has been subsequently reversed, it is any the less effective as an estoppel between the parties while in force." (Emphasis supplied.)

Also see:

> Opinion of Judge Geo. C. Scott on hearing on permanent injunction (R. 718).

The cases and authorities cited by petitioner at pages 80-83 of its brief with reference to jurisdiction of the Delaware court in matters involving internal affairs of the bridge company, are, we submit, wholly irrelevant. The Delaware statute cited, page 81, simply deals with the status of ownership of capital stock of Delaware corporations for purposes of title, action, attachment, garnishment and jurisdiction "*of all courts held in this state,*" and in no manner supports petitioner's contention.

Jurisdiction of a foreign corporation having attached by proper service, the question of whether relief relating to such corporations' internal affairs should be granted, is in no proper sense jurisdictional, but is one of discretion in the exercise of the jurisdiction determined by considerations of convenience, expediency, efficacy and justice.

> See Fletcher Cyc. Corp. (Perm. Ed.), Vol. 17, Sec. 8427, p. 376.
> *American Creosote Co.* v. *Powell,* 298 Fed. 417, certiorari denied 265 U. S. 595.

When a corporation is sued it has a right to defend the suit on all proper grounds.

> See Fletcher Cyc. Corp., Vol. 18, Sec. 8672, p. 242.

In *Burnrite Coal Briquette Co.* v. *Riggs, et al.,* 274 U. S. 208, the court said:

> "According to the supposed exception, a party who has acquiesced and has thereby joined in mis-

leading the court into an erroneous exercise of jurisdiction, may not complain when he is thereafter saddled with the charges. And he will be held to have acquiesced, despite challenge of the jurisdiction, if his challenge was placed wholly upon an untenable ground; for, by objecting only on the untenable ground, he may have misled the court as much as if he had not objected at all."

Now, we have the spectacle of Phoenix trying to reach back into the record of the former trial and to inject into it a question of internal management of the bridge company after the cause has been tried, determined and the decision affirmed. Of course, they do not cite any decision in support of this contention. It is so ridiculous that there can be no decision in support of it.

In any case where one corporation sues another, who may raise the question of internal management of the defendant corporation being involved? Is it the defendant that is being sued, or may the plaintiff corporation reach over on the defense side to raise the question?

No question of the internal managment was involved in this case, nor is any question of internal management involved in the Delaware case enjoined, and so obviously it can have no bearing on the question of *res judicata.*

Furthermore, there is no proper question of internal management presented. Petitioner in this case sought the return of stock which it had used in its fraudulent enterprise, and it is now seeking to recover the same stock in the Delaware action because it failed in that enterprise. In this case it sought to recover on the basis of a claimed individual right as against the corporation alone as a defendant, and it is seeking to do the same thing in the enjoined Delaware action. It involves no question of inter-

nal management because in each instance all that was attempted to be asserted and all that is attempted to be asserted is an individual right; just like any other claim that may be asserted against a corporation in any court having jurisdiction of the parties. The Phoenix' position is no different than if a stranger were suing for the return of stock which he had used in perpetrating a fraud on the corporation.

In Fletcher Cyc. Corp., Vol. 17, Sec. 8429, pp. 385-387:

> "Where, however, the acts of the foreign corporation complained of affect the complainant's individual rights only, then our courts will take jurisdiction wherever the cause of action arises."

Aso see *La Varre* v. *Hall,* 42 Fed. (2) 65.

To say that the perpetration of a fraud upon a corporation by obtaining from it bonds in exchange for shares of stock is such a matter of internal management that a court dealing with the entire fraudulent conspiracy, of which the particular fraud was but a part, and in the accomplishment of the attempted result of which the particular fraud was a step, is too shocking for consideration.

The court will note that counsel for petitioner studiously refrain from referring to the *findings of fraud,* to which reference has just been made, but confine themselves entirely to the findings of a violation of the corporate charter and of the Delaware statutes.

The facts with reference to this transaction are set out in the citations in support of *Finding* 9-b, *supra,* pp. 104-110. This stock consisted of 40 shares bought by

Thompson & Co. in the name of Thompson and 477 shares of stock that Thompson & Co., subsidiary of Phoenix Finance System, Inc., bought from Shaffer & Company. Thompson induced his controlled board of directors to exchange the stock for bonds. The transaction was not merely illegal but fraudulent, part and parcel of a fraudulent conspiracy.

(a) It was in violation of the Delaware statute under which the the bridge company was incorporated (Section 19, Article 1, General Corporation Laws of Delaware, F.R. 186).

(b) It was in direct violation of the bridge company's charter with respect to a redemption of preferred stock (F.R. 1496).

(c) It was an actual fraud against the bridge company as a corporation in that it was intended by Thompson and his associates to illegally and fraudulently change the stock liability into an indebtedness purported to be secured by the fraudulent trust deed on all the property of the corporation.

(d) It was also a fraud on the other holders of Class A stock of the corporation, of which there were a large number, who were not notified of the proposed transaction and were not given any opportunity to participate in exchange of Class A stock for bonds.

This was asserted in the petition of intervention as amended and also alleged in answer to the petition for rehearing (F.R. 398).

The 517 shares of stock were surrendered or turned over to the bridge company as a part of a fraudulent scheme, plan and conspiracy and the $60,500.00 of bonds

were fraudulently issued as a part and parcel of such fraudulent conspiracy. In furtherance of such conspiracy letters and notices were sent through the United States mail to stockholders containing false and fraudulent statements for the purpose of procuring proxies and inducing them to vote for the bond issue at the meeting called for that purpose, which was in violation of Section 215 of the Federal Penal Code (F.R. 795, 591-2, 612, 1655; see especially Exhibit G. A. B. 5, F.R. 1605, G. A. B. 6, F.R. 1607, G. A. B. 8, F.R. 1609, G. A. B. 9, F.R. 611, testimony of G. C. Ditmann, F.R. 654).

Then in furtherance of the conspiracy, John A. Thompson, and his associates, conspiring and confederating together, held a stockholders' meeting on December 22, 1932 (F.R. 951-954), pursuant to the fraudulent statements and representations contained in said letters and at that meeting like fraudulent statements were orally made by John A. Thompson and incorporated in the resolutions authorizing the bond issue which were passed. Then with intent to cheat and defraud the Iowa-Wisconsin Bridge Company, a directors' meeting was held and through Thompson's control, resolutions passed to exchange the bonds for stock (F.R. 973-978), which contained false statements, and the bonds thereafter turned over to Phoenix Finance Corporation as a part of said conspiracy on the pretense that it was entitled thereto, all in violation of the criminal statutes of Iowa.

Iowa Code, 1935, Sec. 13045, provides:

> "If any person designedly or by false pretense or by any privy or false token and with intent to defraud, obtain from another any money, goods, or other property, or so obtain the signature of any person to any written instrument, the false making

> of which would be punished as forgery, he shall be imprisoned in the penitentiary not more than seven years or be fined not exceeding $500.00, or be imprisoned in the county jail not exceeding one year, or be punished by both such fine and imprisonment."

Section 13162, Code of Iowa, 1924, provides:

> "If any two or more persons conspire or confederate together with the fraudulent or malicious intent wrongfully to injure the person, character, business, property, or rights in property of another, or do any illegal act injurious to the public trade, health, morals, or police, or to the administration of public justice, or to commit any felony, they are guilty of a conspiracy, and every such offender, and every person who is convicted of a conspiracy at common law shall be imprisoned in the penitentiary not more than three years."

The transaction, therefore, not only was an *ultra vires* transaction, but illegal, fraudulent and contrary to public policy.

The distinction between *mala in se* and *mala prohibita* has been abandoned, but, were this otherwise, there is authority for regarding as *malum in se* any act which is fraudulent, contravening public policy and a penal statute.

> *Irwin* v. *Curie*, 171 N. Y. 409, 64 N. E. 161.
> *Gibbs* v. *Consolidated Gas Co.*, 130 U. S. 396.
> *McMullen* v. *Hoffman*, 174 U. S. 639.
> *Equitable Life Assur. Soc. use of Reilly* v. *Wetherill*, 62 CCA 579, 127 Fed. 947.

Money or property used to perpetrate a fraud cannot be recovered by the party who has perpetrated the fraud.

In *Dent* v. *Ferguson,* 132 U. S. 50, the court said:

"If a party seeks relief in equity he must be able to show that on his part there has been honesty and fair dealing. If he has been engaged in an illegal business equity will not help him."

See, also:

Mil. & M. R. R. Co. v. *Soutter,* 13 Wall. 517.
Harriman v. *Northern Securities Co.,* 197 U. S. 244.
White v. *Barber,* 123 U. S. 392.
MacIntosh v. *Wilson,* 81 Ia. 339, 46 N. W. 103.

In the case of *Second Russian Insurance Co.* v. *Miller,* 268 U. S. 552, the court said:

"By our own law payments made under contracts which are illegal where the parties are *in pari delicto* may not ordinarily be recovered. The law leaves the parties where it finds them and gives no relief. *Thomas* v. *City of Richmond,* 12 Wall. 349, 20 L. Ed. 453; *Higgins* v. *McCrea,* 116 U. S. 671, 6 S. Ct. 557, 29 L. Ed. 764; *White* v. *Barber,* 123 U. S. 392, 423 S. Ct. 221, 31 L. Ed. 243; *Dent* v. *Ferguson,* 132 U. S. 50, 10 S. Ct. 13, 33 L. Ed. 242; *St. Louis R. R.* v. *Terre Haute R. R. Co.,* 145 U. S. 393, 407, 12 S. Ct. 953, 36 L. Ed. 746; *Harriman* v. *Northern Securities Co.,* 197 U. S. 244, 294, 25 S. Ct. 493, 49 L. Ed. 739; *Farrington* v. *Stucky,* 165 F. 325, 330, 91 CCA 311; *Levy* v. *Kansas City,* 168 F. 524, 93 CCA 523, 22 L. R. A. (N.S.) 862. While there are exceptions to this rule, appellant's case does not fall within any recognized exception and the record suggests no special consideration of equity or of our own public policy which would justify an exception in this case."

The transaction by which the bonds were procured was not only *malum prohibitum,* but was *malum in se* in that it was founded in fraud and in acts that contravened the penal statutes.

The situation is analogous to one where a party conveys his property to another with intent to defraud his creditors and then sues the grantee to recover such property. As held in the case of *Weir* v. *Day*, 57 Iowa 84, recovery cannot be had. Where such an action is tried, the determination thereof necessarily is a final adjudication and the grantor in such situations would not be entitled to maintain a second suit involving the same question.

In the present case the court has found that the stock was used in a fraudulent conspiracy to fraudulently obtain the bonds involved, and that the Phoenix Finance Corporation is not entitled to return of the stock. The question of the return of the stock was in issue and involved in the trial of this cause and fully litigated as shown in this brief, *supra*, pages 104-110, in support of the court's finding, 9-b, and the Phoenix again presented the issue of the return of the stock and submitted it to the court for decision on its petition for modification of decree. That court decided it and that decision has been affirmed by the circuit court. That Phoenix is not entitled to the return of the stock is fully sustained by the authorities cited above.

This court in passing upon the order of the trial court denying the petition for modification of the decree in which Phoenix asked that there be reinvested in it the 517 shares of bridge stock, said:

> "In refusing to modify the decree to require the bridge company to return to Phoenix the 517 shares of stock surrendered in exchange for bonds, the court invoked the maxim that 'he who had done iniquity shall not have equity.' This 'clean hands doctrine' is subject to the familiar limitation that a plaintiff is

not barred from relief in a court of equity unless his wrong has an immediate and necessary relation to the equity for the enforcement of which he prays. (Citing cases.) In the present case the district court adopted the view that all of the transactions leading up to the issuance of the bonds were steps in a single fraudulent enterprise to obtain ownership of the bridge after a foreclosure. We are not disposed to hold that this view of the lower court is wrong; and therefore we cannot say that appellants are entitled to have relief in equity in respect to any part of the fraudulent enterprise. It may be added that the record does not compel the inference that there was no fraud in the original issuance and transfer to the Phoenix of the 517 shares of stock. Having determined that the appellants had no standing to maintain their suit, the district court has neither the right nor the duty to compel the bridge company to restore what it had received from the bondholders. * * * Under these long established principles of equity and the pleadings and proof in this cause, the court did not err in refusing to modify the decree as requested by appellants by granting to complainants affirmative relief against the defendant'' (R. 92-93).

There was nothing in the record to move a court of equity to grant to the petitioner any such affirmative relief. The record shows a case prosecuted by them for nearly five years to consummate the fraudulent conspiracy and to obtain the fruits thereof, and during all this time making it necessary for the Iowa-Wisconsin Bridge Company and its stockholders, the victims thereof, to go to large expense by way of costs, disbursements, and attorneys' fees to extricate themselves from the fraud perpetrated upon them, for which they can get no recompense here. Certainly there could be nothing in such a situation which would appeal to a court of equity.

Phoenix Finance Corporation is not entitled to relitigate this question by merely repleading the same transaction and thereby involving the bridge company in the expense of defending in Delaware or requiring it to again present the evidence involved in this case.

United States v. *California & O. Land Co.*, 192 U. S. 355, 24 Sup. Ct. 266.

The matters between Phoenix Finance Corporation and the bridge company have been fully litigated and determined.

And as stated in *S. Pacific Ry. Co.* v. *U. S.*, 168 U. S. 1, 43 L. Ed. 355, 185 S. Ct. 18, 28:

> "A judgment upon the merits constitutes an absolute bar to a subsequent suit upon the same cause of action *in respect to every matter offered and received in evidence or which might have been offered to sustain* or defeat the claim in controversy." (Emphasis supplied.)

See also:

Rew v. *School District*, 125 Iowa 28, 98 N. W. 802.

Bagley v. *Bates*, 223 Iowa 836, 273 N. W. 934.

This matter was not only involved in the original trial but the trustees and Phoenix again presented the matter in petition for rehearing and modification of decree (F.R. 223), to which answer was filed alleging that the 517 shares of capital stock surrendered by Phoenix to the bridge company were so turned over as a part of the fraudulent scheme, plan and conspiracy to procure bonds (F.R. 398), and such petition for rehearing was denied and the matter fully determined (F.R. 411-413). Not only

is the court's decree *res judicata* thereof, but the court's ruling and order on petition for rehearing is *res judicata.*

Spencer v. *Watkins* (8 CCA), 169 Fed. 378, cert. den. 215 U. S. 605.
Bernard v. *Idaho Bank & T. Co.*, 21 Idaho 598, 121 Pac. 481, Ann. Cas. 1913E 120.
American Surety Co. v. *Vivian F. Baldwin,* 287 U. S. 156.

(k) There was no misunderstanding in the submission of the case to the Master.

The entire matter was submitted to the Master for decision at one time (F.R. 694). The court's ruling on petition for rehearing is an adjudication that there was no misunderstanding (F.R. 411). That ruling was assigned as error by trustees and Phoenix (F.R. 507 and 527), and was again urged in the Circuit Court of Appeals and the trial court's decision affirmed, and that decision cannot be collaterally attacked by re-assertion of the same matter.

Spencer v. *Watkins* (8 CCA), 169 Fed. 378, cert, den. 215 U. S. 605.
Root v. *Woolworth,* 150 U. S. 401.
Nash v. *Williams,* 20 Wall. 226, 22 L. ed. 254, 259.

In none of the cases cited by petitioner was there a consent reference of the entire case. Those cases merely held that where the validity of the bonds and mortgage and trust deed were *admitted and proven* that then it was not necessary to show in whose hands the bonds were or to require their production prior to the decree. None of the cases cited by petitioner hold that a fraudulent mortgage or deed of trust and fraudulent bonds without consideration may be foreclosed without trial determining

the question of the fraud and invalidity inhering therein and the amount due, if any.

In *Speers Sand & Clay Works* v. *American Trust Company* (CCA 4), 20 Fed. (2d) 333, 336, where the validity of a large number of corporate bonds secured by mortgage was in dispute, the court held that decree of sale in foreclosure proceedings before determination of the amount and legality of the bonds was premature and that such decree should be set aside. The court said:

> "The defendant and bondholders of all bonds, the title to which is undisputed, have the right to have such questions adjudicated and the amounts and ownership of the bonds fixed and determined, before the sale of the mortgaged property is authorized by the court. This is especially true in the instant case where the validity and title of so large a quantity of bonds is disputed."

In *James* v. *Milwaukee & Minn. Ry. Co.*, 6 Wall. 752-756, where the amount of bonds in the hands of *bona fide* holders were less than $200,000 and the notice of sale set forth that the mortgage debt was $2,000,000 and that $70,000 interest was due, it was held that the sale could not be upheld without sanctioning the grossest fraud and injustice.

See also:

Stewart v. *Florida G. & W. Ry. Co.* (CCA 5), 255 Fed. 616.
41 C. J., p. 865, Sec. 1066.
41 C. J., p. 433, Sec. 306.
Nashua Savings Bank, et al. v. *Burlington Elec. Light Co., et al.* (C.C.S.D. Iowa), 99 Fed. 14.

POINT THREE.

(Answer to Petitioner's Point Three.)

The injunction orders against Phoenix do not violate principles of equity jurisdiction.

The fact that the defense of *res judicata* can be urged in the Delaware court does not furnish any reason why injunctive relief should not be granted.

In Story on Equity Jurisprudence (14th ed.), Sec. 1194:

> "(1) Exercise of jurisdiction of courts of equity to stay proceedings at law by injunction can be traced back to the beginning of the reign of Henry VII, and was consistently upheld despite the objection of courts of common law."

Section 1209 states:

> "* * * And if after a decree in equity a party shall proceed at law for the same matter they will interfere by way of injunction. So if a decree is made against a party on the merits, and he afterwards brings a bill in a foreign court for the same subject matter, a court of equity will grant an injunction against proceeding in such foreign suit." (Citing *Booth* v. *Leycester*, 1 Keen R. 579.)
>
> "Indeed wherever after a bill is filed in equity the party institutes a suit at law for the same matter, it is treated as a contempt of court, for the jurisdiction has already attached in equity; and it is a gross oppression to vex another with a double suit for the same cause of action." (Citing Edin on Injunctions, Ch. 2, pp. 34-38.)

Section 1227 states:

> "Following a discussion of the rights of courts of equity to interfere to suppress vexatious litigation, Mr. Justice Story says:
>
> " 'Upon the same ground that the courts of equity have interposed by way of injunction to prevent a party who has been discharged from a contract by the sentence of a foreign court from being sued on the contract in the courts of law of another state. Such a sentence if obtained on the merits is, or certainly ought to be, conclusive between the parties, and as such there would seem to be a complete defense at law against a new suit by the plea of *res judicata*. But courts of equity have deemed it right nevertheless to sustain the jurisdiction, because the nature and effect of a foreign judgment may not be without hazard and embarrassment in a suit at law, and there is a great difference between domestic and foreign judgments in their forms as well as in their effects as records.' "

The original cause of action, if any, arose in Iowa. The mortgaged property, over which the original contention arose, is situated in Iowa, except one end and dike of the bridge which is in Wisconsin. The witnesses all reside in Iowa and Minnesota, except one whose deposition was taken in Chicago, and one lives in Chicago and testified at the trial, and except the former president of Phoenix, who resides in Florida, but who testified in person at the original trial in Iowa. (F.R. 532, 561, 565, 582, 587, 588, 608, 613, 617, 619, 620, 624, 637, 648, 650, 653, 655, 663, 665, 670, 672, 685, 538.) Twenty-nine witnesses thus residing testified by deposition or in person at the trial, a number of them as unwilling, adverse witnesses called by interveners in behalf of the bridge company.

On September 23, 1938, after the Circuit Court of Appeals decision, the Phoenix petitioned that court for stay of mandate on the ground that it intended to apply to the Supreme Court of the United States for writ of certiorari. On October 3, 1938, the stay was granted (F.R. 1716-1717). Petition for certiorari was filed in this court on October 26, 1938. In the meantime, without awaiting the decision of this court, and with the obvious purpose of not complying with it, if adverse, Phoenix on September 29, 1938, filed its first Delaware action (Ex. SC-1, R. 294-301). Phoenix' petition for certiorari was denied on December 5, 1938 (305 U. S. 650), and rehearing was denied January 3, 1939 (305 U. S. 676). Thereafter Phoenix filed the various other suits and the mortgage.

The bridge company's principal place of business is at Lansing, Iowa, although it is incorporated in Delaware. The Phoenix principal place of business was at Des Moines, Iowa, prior to its migration to Florida.

The claims made against the bridge company and determined in this cause are identical with those now made against the bridge company in the Delaware suits—based on the same alleged obligations. In this case the court found those alleged obligations to be part and parcel of a general plan and conspiracy to defraud the bridge company and its stockholders out of their property without consideration (F.R. 157). Now it is sought to re-litigate the same matters, divided into five different lawsuits, four at law and one in equity, over one thousand miles from the location of the original trial, and instead of in Iowa, at a place where none of the witnesses reside. Attendance of witnesses there could only be had at great expense, and the attendance of unwilling witnesses could

not be had at all. Some of the witnesses may be dead. Trial with only depositions on the part of the bridge company would be very disadvantageous to it, especially in the Delaware law actions, and advantageous to the Phoenix, whose former president, chief actor in the conspiracy, the Master found unworthy of belief (F.R. 129-134). Trials in five different actions of parts of the one original conspiracy would involve the proving of substantially the whole conspiracy in each Delaware action for proper defense. The expense would be enormous and the opportunity of defense inadequate. Such actions would also involve appeals and ultimate petitions for writs of certiorari to this court. This would be true even if the bridge company were successful, because Phoenix is not disposed to abide by adverse judicial decisions.

This case was particularly one of equitable cognizance, as shown by the record on file. It involved complicated accounts and accounting and a great mass of exhibits, books of account and records, difficult, if not impossible, to adequately present at law to a jury on retrial of various parts of this cause. Accounting has always been held by this court to be of equitable jurisdiction. *Winston & Co.* v. *Georgia & F. R. R., et al.*, 34 Fed. (2) 163.

The bridge company, as shown by the opinion, findings and decree of the trial court and of the Circuit Court of Appeals in this case, has good defenses to all of said actions, in addition to the fact that they have been adjudicated, which would necessarily have to be supported by evidence to protect its interests in the event the Delaware court ruled against the plea of *res judicata*. It might be asserted that on the offer of evidence in such actions

the bridge company could object on the ground that it conflicted with the previous adjudication, but if such objection should be overruled, it would immediately be necessary for the bridge company to have its evidence as to its other defenses available. The federal courts having first obtained jurisdiction have the prior right to construe and to determine the effect of their decrees and orders.

In *Oates* v. *Morningside College* (1934), 217 Iowa 1059, 252 N. W. 783, wherein plaintiff was executor of the estate of Trimble, deceased, late of Buena Vista County, Iowa, the decedent had given the defendant a note secured by mortgage on Iowa real estate. The defendant brought an action on the note and mortgage in foreclosure proceedings in Iowa, naming the executor defendant therein. The executor demurred to the petition on the ground that no claim had been filed within twelve months after his appointment as provided in the statute of limitations, which was sustained as to any liability of plaintiff as executor. The defendant, plaintiff in that action, obtained a judgment *in rem* for the foreclosure of the mortgage, and the action against the executor was dismissed by court's ruling on demurrer. The mortgaged property was bid in for $2,136.38 less than the amount claimed without deficiency judgment. Ancillary administration was taken out in South Dakota to enable the executor to carry out the terms of the will. While the ancillary administration was pending the defendant filed a claim in the ancillary estate in South Dakota for the deficiency amount not realized in the foreclosure action in Iowa. Both parties were residents of Iowa. Plaintiff, executor, then brought action to enjoin the defendant from prosecuting the action brought against the ancillary

estate in South Dakota on the ground that it would be inequitable, unjust and harassing, and cause the plaintiff irreparable injury; that the action had already been litigated in Iowa, and that the proceeding in South Dakota was an attempt to evade the effect of the adjudication upon the same indebtedness already made by the District Court of Pocahontas County, Iowa, and an attempt to evade the public policy and laws of Iowa, under which the claim filed in South Dakota was already barred by the statute of limitations of Iowa. The court quoted with approval the language of the court in *O'Haire* v. *Burns*, 45 Colo. 432, 100 Pac. 755, 757, 25 L. R. A. (N.S.) 267, as follows:

> "We have no doubt but that Mr. Burns could have pleaded in the Iowa actions the former litigation in this state and the result thereof as a complete defense, and, if established by proper evidence, it would have received the full faith and credit by the Iowa court to which it is entitled under the Constitution of the United States, but why compel him to go over 600 miles to a foreign jurisdiction from that from which both parties reside, or from where the original cause of action, if any, accrued, from where the property over which the original contention arose was situated, and from where all the witnesses reside, in order to present these facts to a foreign tribunal? We have been furnished with no principle of law or equity nor process of sound reasoning why this should be done and are of the opinion none can be presented. Besides, if O'Haire is allowed to continue his Iowa suit, and is defeated, under this same rule he could, if aided by persons with means, bring another action in some other state wherever perchance he might secure personal service upon Mr. Burns, and thus compel him to again defend the same action with at least the plea and proof of *res judicata* and so continue with-

> out any redress. The fallacy of the statement is itself an answer to it. This method of equitable relief appears to have been approved by the great weight of authorities, and for answer to the able argument of counsel against it, we refer to the reasons assigned in support thereof in the following cases: *Cole* v. *Cunningham*, 133 U. S. 107, 10 S. Ct. 269, 33 L. Ed. 538. • • •"

And the court said:

> "It appearing from the record that the claim now filed in the ancillary estate in South Dakota has already been adjudicated by the courts of Iowa in the foreclosure proceedings referred to, *we believe it would be clearly inequitable and unjust, and would cause great hardship and irreparable injury* upon this estate to compel the executor hereof to again litigate the same matter in the courts of South Dakota. For this reason we believe the lower court erred in not granting the relief prayed for in this action."

As previously noted the decision of the Delaware Superior Court in the one case was not in existence at the time this cause was submitted on hearing on permanent writ of injunction March 11, 1940, and of course this case should be considered as of the date of its submission. At that time all the Phoenix needed to do was to dismiss its cases. If it has since obtained any judgment it is necessary for it to satisfy it under its stay bond herein. That was not before the trial court nor mentioned in Phoenix' statement of points to be relied on on appeal (R. 732-735).

POINT FOUR.

(Answer to Petitioner's Point Four.)

The permanent prohibitory and mandatory injunction against Phoenix did not violate Section 265 of the Judicial Code.

The injunction does not violate Section 265 of the Judicial Code (28 U.S.C.A., sec. 379). The bridge company was entitled to an injunction as granted by the court. The federal court first acquired jurisdiction. The federal court had appointed a receiver and taken into legal custody all of the property of the bridge company of every description; it had rendered its opinion, findings of fact and conclusions of law and final decree, reserving jurisdiction to deal with all matters arising under the receivership and in connection with adjustment and payment of taxes and counsel's fees before any of the Delaware actions were commenced. This action is still pending in the United States District Court, Northern District of Iowa, with the receiver in charge of all of the bridge company's property.

Judicial Code, Section 262 (28 U.S.C.A., Sec. 377), provides:

> "Power to issue writs. *The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.*"

Judicial Code, Section 265, is not a jurisdictional statute, but a mere limitation upon the general equity

powers of the federal courts, preventing relief by injunction in the cases covered by it.

Smith v. *Appel* (Kan. 1924), 264 U. S. 274, 44 S. Ct. 311, 68 L. ed. 678.
Patton v. *Marshall* (W. Va. 1909), 173 F. 350, 97 CCA 610, 26 L. R. A. (N.S.) 127.

Section 265 of the Judicial Code must be construed in connection with Section 262 of the Judicial Code, and if a federal court has first obtained jurisdiction of a case it can take such action as may be necessary to maintain its authority and enforce its decrees.

Lanning v. *Osborne* (C.C.), 79 Fed. 657, 662.
Julian v. *Central Trust Co.*, 193 U. S. 93, 24 S. Ct. 399, 48 L. ed. 629.
French v. *Hay*, 22 Wall. 250-253, 22 L. ed. 857.
Dietsch v. *Huidokoper*, 13 Otto 494, 103 U. S. 494, 26 L. ed. 497.

Section 265 of the Judicial Code does not deprive a district court of the jurisdiction otherwise conferred by the federal statutes, but merely goes to the question of equity in the particular bill, making it the duty of the court, in the exercise of its jurisdiction, to determine whether the specific case presented is one in which the relief by injunction is prohibited by this section or may nevertheless be granted.

Sovereign Camp W. O. W. v. *O'Neill*, 266 U. S. 292.
Smith v. *Apple*, 264 U. S. 274.

Section 265 of the Judicial Code applies only to cases where the proceedings are first commenced in state courts.

Hamilton v. *Walsh* (C.C.R.I. 1885), 23 F. 420.
Lanning v. *Osborne* (C.C. Cal. 1897), 79 F. 657.
Jewel Tea Co. v. *Lee's Summit, Mo.* (D.C. 1912), 198 F. 532, affirmed (CCA 1914) 217 F. 965.
Kansas City Gas Co. v. *Kansas City* (D.C. Mo. 1916), 198 F. 500.

In *Looney* v. *Eastern Texas R. R. Co.*, 247 U. S. 214, 38 S. Ct. 460, 462, the court said:

> "The use of the writ of injunction, by federal courts first acquiring jurisdiction over the parties or the subject-matter of a suit, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished and complete justice done between the parties is familiar and long established practice. (Citing authorities.) So important is it that unseemly conflict of authority between state and federal courts should be avoided by maintaining the jurisdiction of each free from the encroachments of the other, that section 265 of the Judicial Code, Revised Statutes, section 720, Act of March 2, 1793, c. 22, 1 Stat. L. 334 (Comp. St. 1917, #1242), has repeatedly been held not applicable to such an injunction." (Citing authorities.)

In *Bethke, et al.* v. *Grayburg Oil Co.* (5 CCA), 89 Fed. (2) 526, cert. denied 302 U. S. 730, where receivers were appointed by the United States District Court for the Western District of Texas for Grayburg Oil Company on a bill to foreclose a mortgage deed of trust securing an issue of bonds. The bill alleged that the company was solvent, but in danger of becoming insolvent. The receivers were authorized to disaffirm leases. Appellants

held lease and filed claim thereon. After the federal receivership had resulted in a compromise of claims by partial payment to appellant, a final judgment and return of the property to the corporation in receivership and after termination of the receivership proceedings, appellants filed suit in District Court of Hayes County against the Grayburg Oil Company to recover $12,000 rent under the lease, less credits which included amount received in settlement of claim in receivership proceeding. Grayburg Oil Company filed a bill in the receivership proceedings in the federal court against appellants for interlocutory and final injunction to restrain them from prosecuting the suit in state court. Appellants moved to dismiss the ancillary bill for want of equity, mainly on the ground that defendant had defense at law in state court. The appeal was from final decree awarding injunction against appellants. Appellants contended that suit in state court was *in personam* and did not involve lien on property under dominion of federal court, and that they were not bound by receivership proceedings. The court, after considering Section 265 of the Judicial Code and reviewing the decisions of this court, held that the federal court had ancillary jurisdiction to enjoin a subsequent action in the state court *in personam* to relitigate the same matters and to enforce and effectuate its decrees, and that appellants were bound by the receivership proceedings, and that the injunction was properly granted.

The court said:

> "Mrs. Bethke contends on her own behalf that the realty leased to Grayburg Oil Company was her separate property and that she was not bound by the acts of her husband in connection with the claim.

The contention is frivolous. It is apparent from the record that she personally participated in urging the claim and received the benefit of the payment made on it.

"*There is no doubt that the District Court was justified in issuing the injunction in aid of its jurisdiction and to protect the rights of the Grayburg Oil Company secured by the judgments in the receivership proceedings. An adverse decision by the state court would put appellee to great trouble and expense and deprive it of the benefit of the judgment obtained in the federal court.* Furthermore, it may be presumed that if appellants were permitted to re-litigate in a state court the issues that were finally decided in the federal court, other creditors to a large number would be encouraged to do the same. There must be an end to litigation.

"It would have been wrong for the District Court to have entertained the cross-bill or to have transferred the case to the law side."

In *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 54 S. Ct. 695, 78 L. ed. 1230, Hunt had been discharged in bankruptcy. Thereafter the loan company brought suit in a municipal court of Chicago against Hunt's employer to recover on an assignment of salary amounts accruing to Hunt after his discharge in bankruptcy. Those proceedings had ended. Hunt filed a bill in the bankruptcy court and obtained an injunction against further prosecution of the suit in municipal court. This court held that the proceedings being ancillary and dependent the jurisdiction of the court followed the original cause and might be maintained without regard to the citizenship of the parties or the amount involved, and notwithstanding the provisions of Section 265 of the Judicial Code, and that the

injunction properly issued, and that notwithstanding the state court had jurisdiction and that Hunt might intervene and urge his discharge in defense of that action *that such legal remedy thus afforded would not be adequate to meet the requirements of justice; that it would involve an obvious long and expensive course of litigation and would put him to the necessity of taking repeated appeals and deprive him of an adequate remedy.* In considering that case as an authority in this case it is immaterial that the original jurisdiction of the federal court was in bankruptcy because those proceedings had ended, and the ancillary bill did not come under the provisions of the bankruptcy act, but under the powers of the court in equity, the same as the instant ancillary bill.

In *Garner* v. *Second National Bank of Providence, et al.* (1 CCA, April 16, 1895), 67 Fed. 833, which was an action in equity involving rights to real estate, wherein an interlocutory decree had been rendered for complainant and the cause referred to a Master for an accounting of rents and profits, the complainant, pending proceedings before the Master, commenced an action at law in the Superior Court of the State of New York to recover the same rents and profits, and subsequently moved to discontinue the suit in equity and refused to have the Master's report opened. Defendant filed a petition in the cause asking that the complainant be enjoined from prosecuting her action at law, and that she be required to dismiss the same. The Circuit Court of Appeals, in its opinion, pointed out that complainant was not entitled to have the action in the federal court dismissed; that in that case the expense and time involved in the litigation, which resulted in the decree, independently of other considerations, rendered it grossly inequitable to permit

"such disposition of any part of the suit as would make possible a new contest over any question at issue," and that the provisions of Section 720 of the Revised Statutes, present Judicial Code 265, did not apply to proceedings incidental to jurisdiction properly acquired by a federal court for purposes other than the enjoining of proceedings in a state court, and that the complainant was properly perpetually enjoined and required to dismiss the suit in state court.

In *St. Louis Min. & Milling Co.* v. *Montana Mining Co.* (CC), 148 Fed. 450, it was held that a party who has appeared in a Federal Court and contested an action therein through both trial and appellate court, the result being final judgment against him, will not be permitted to render such judgment ineffectual by instituting and maintaining a new suit in a state court, the purpose of which is to re-litigate the questions determined by such judgment with the same adversary, and that Revised Statutes Section 720, present Judicial Code Section 265 does not prevent a Federal Court from enjoining a party to an action before it from prosecuting a suit in a state court when necessary to protect its own prior jurisdiction or to make effectual its own prior judgment, determining the rights of the parties before it.

The court said, after reviewing the decisions of this court:

> "They further establish that section 720 was not intended to impair the jurisdiction of the federal courts, as that jurisdiction had been conferred by the Constitution and laws, which empower courts of equity to interfere and effectuate their own decrees by injunction or writs of assistance, in order to avoid the relitigation of questions once settled between the parties. Story's Equity Jurisprudence,

#959; *Central Nat. Bank* v. *Stevens*, 169 U. S. 432, 18 S. Ct. 403, 42 L. ed. 807; Foster's Federal Practice, #211, Desty's Fed. Procedure, vol. 2, p. 803."

The Federal Court has unquestioned power to effectuate its decrees and to prevent relitigation of the same matter.

In *Root* v. *Woolworth* (1893), 150 U. S. 401, 14 S. Ct. 136, 139, the court said:

> "It is well settled that a court of equity has jurisdiction to carry into effect its own orders, decrees, and judgments, which remain unreversed, when the subject-matter and the parties are the same in both proceedings. • • •
>
> "The jurisdiction of courts of equity to interfere and effectuate their own decrees by injunctions or writs of assistance, in order to avoid the relitigation of questions once settled between the same parties, is well settled. Story, Eq. Pl. (9th Ed.) #959; *Kershaw* v. *Thompson*, 4 Johns. Ch. 609, 612; *Schenck* v. *Conover*, 13 N. J. Eq. 220; *Buffum's Case*, 13 N. H. 14; *Shepherd* v. *Towgood*, Turn & R. 379; *Davis* v. *Bluck*, 6 Beav. 393. In Kershaw vs. Thompson the authorities are fully reviewed by Chancellor Kent, and need not be re-examined here."

In Sarson v. *Maccia* (N. J. Ch.), 108 Atl. 109, at 111, the court said:

> "It is the settled law of this state (and I quote from the opinion of this court in *Putnam* v. *Clark*, 34 N. J. Eq. 532, affirmed by the Court of Appeals) that—
>
> "'If, after a decree in equity, a party shall proceed at law for the same matter, equity will restrain him by injunction. Such suit at law is treated as contempt of court, for it is gross oppression to vex

another with a double suit for the same cause of action.'" (Citing cases.)

In *French* v. *Hay*, 22 Wall. 250, 22 L. Ed. 799, the court said:

> "Having the possession and jurisdiction of the case, that jurisdiction embraced everything in the case, and every question arising which could be determined in it, until it reached its termination, and the jurisdiction was exhausted. While the jurisdiction lasted, it was exclusive, and could not be entrenched upon by any other tribunal."

The court also speaks of the results which would follow if relief could not be given by the federal tribunals where their jurisdiction attached, and demonstrates that their decrees might be nullified, in so far as any protection could be given by them.

> "Instead of terminating the strife between him and his adversary, they would leave him under the necessity of engaging in a new conflict elsewhere. This would be contrary to the plainest principles of reason and justice. The prohibition in the judiciary act against the granting of injunctions by the courts of the United States, touching proceedings in state courts, has no application here. The prior jurisdiction of the court below took the case out of the operation of that provision."

Also see:

Hickey v. *Johnson* (8 CCA), 9 Fed. (2) 498.
Sterling v. *Gredia*, 5 Fed. Supp. 329.
American Surety Co. of N. Y. v. *Baldwin*, 2 Fed. Supp. 679.
Hesselberg v. *Aetna Life Ins. Co.* (8 CCA), 102 Fed. (2) 23.

Toucey v. *New York Life Ins. Co.* (8 CCA), 102 Fed. (2) 16, 33.
Swift v. *Black Panther* (8 CCA), 244 Fed. 20.
Wilson v. *Alexander* (5 CCA), 276 Fed. 875.
Julian v. *Central Trust Co.*, 193 U. S. 93.
Riverdale Cotton Mills v. *Alabama-Georgia Mfg. Co.*, 198 U. S. 189.
Wells Fargo v. *Taylor*, 254 U. S. 175.
Kern v. *Huidekoper*, 103 U. S. 494.
Munro v. *Raphael*, 288 U. S. 485.
Gunter v. *Atlantic Coast Line R. R. Co.*, 200 U. S. 273.
Slaughter v. *Slaughter* (5 CCA), 48 Fed. (2d) 210.
St. Louis-San Francisco R. R. Co. v. *McElvaine*, 253 Fed. 123.

POINT FIVE.

(Answer to Petitioner's Point Five.)

The petitioner's point five has no application to the case at bar. The matters involved herein were after full hearing determined by the federal court.

POINT SIX.

(Answer to Petitioner's Point Six.)

All questions of jurisdiction were determined in the original hearing and such determinations are *res judicata.*

In the original hearing it was determined that Phoenix was fully represented by the trustees. On appeal to the Circuit Court of Appeals, that court stated:

> "At that time, before Phoenix became a party, there was complete diversity of citizenship. Had Phoenix not become a party the court could have pro-

ceeded to final judgment, granting or denying foreclosure. It could have decided every issue including the validity of the trust deed, and the amount of the debt secured thereby; and the decree would have been binding upon the bondholders without their presence as parties to the record."

Then speaking of appellant's contention that the proceeding below was a consolidation of two separate and distinct suits, one brought by the trustees to foreclose the trust deed and one brought by the bridge company and interveners to cancel the bonds held by Phoenix, and that jurisdiction as to each controversy must be determined separately, the court said:

> "This is without merit. * * * Furthermore, if the controversy between the two Delaware corporations should in any way be considered as a separate controversy involving only the validity of certain of the bonds, then it was ancillary to the foreclosure proceeding, and jurisdiction attached irrespective of citizenship because the subject matter had been drawn into the federal court under the receivership before Phoenix became a party. (Citing authorities.) The court did not err in overruling appellants' attack on the jurisdiction."

(F.R. 1689, 1694.) Petition for writ of certiorari was denied (305 U. S. 650).

The authorities cited by Phoenix under this point are mere repetition of what it cited on its first petition for writ of certiorari before this court, entitled Phoenix Finance Corporation, petitioner vs. Iowa-Wisconsin Bridge Company, respondent, No. 438, and the respondent asks the court to take judicial notice of its brief in response thereto to avoid repetition here.

The question of jurisdiction was decided as a contested matter on the original cause by motion to vacate the decree, and on appeal was determined by the Circuit Court of Appeals, and certiorari having been denied by this court, that question was *res judicata*, and cannot again be presented.

Des Moines Navigation & R. R. Co. v. *Iowa Homestead Co.*, 123 U. S. 552.
Dowell v. *Applegate*, 152 U. S. 327.
Davis v. *Davis*, 305 U. S. 32.
Stoll v. *Gottlieb*, 305 U. S. 165.

The cases cited by petitioner are all cases in which

(a) It appeared from the complaint or answer filed that there was a substantial and indispensable interest in the lawsuit owned and held by a party not a party to the record and that adjudication could not be made of the controversy presented without the presence of such party unrepresented in the pending litigation; or

(b) Cases in which the introduction of an indispensable party holding an interest in the lawsuit, wholly unrepresented, ousted the jurisdiction of the court.

Neither situation exists in the instant case. The facts in the instant case are wholly different, and bring it directly within the rule announced in:

Souffront v. *Compagnie Des Sucreries*, 217 U. S. 475.
Anderson v. *Watt*, 138 U. S. 694, 704, 705.
Robbins v. *Chicago City*, 4 Wall. 657, 71 U. S. 657.
Lovejoy v. *Murray*, 3 Wall. 1, 70 U. S. 1, 19.
Hoskins v. *Hotel Randolph Co.*, 203 Iowa 1152, 211 N. W. 423, 427.

Furthermore, the question sought to be raised by petitioner was not raised before the trial court nor before the Circuit Court of Appeals (petitioner's points intended to be relied on on appeal R. 732-735) and cannot be presented for the first time in petition for writ of certiorari.

POINT SEVEN.

(Answer to Petitioner's Points Seven and Nine.)

Petitioner is not entitled to re-litigate this cause since it has been fully adjudicated.

Petitioner on page ninety-six of its brief speaks of "certain *bona fide* claims" in utter disregard of the fact that the federal courts have determined that they have no existence. And then refers to its Exhibit SC-114, not in evidence, in support thereof. Phoenix attached a like report by Ernst & Ernst to its exceptions to the Master's report, made after the Master's report, of an alleged examination of books and certain other documents which were not in evidence (F.R. Supp. 23). This report, however, was not printed, but the preceding figures (F.R. Supp. 22-23) show a claim by Phoenix at that time that it had paid $112,379.03, and the trial court found there was no foundation for the report (trial court's opinion, F.R. 177). Phoenix, in its petition for rehearing by affidavit of Lee J. Skoner, employee of Ernst & Ernst, referred to above, presents figures claimed to represent advances of Phoenix to the bridge company, Phoenix claiming by such affidavit advancements to the bridge company of $95,043.71 (F.R. 308-324). This petition was overruled (F.R. 411-413). Trustees and Phoenix assigned error on the ruling (F.R. 527-528). Before the Circuit Court of Appeals Phoenix contended that it had furnished $161,487.62, and the court found that the "figures are

confuted by the facts" (F.R. 1705). The court has judicially determined that there was nothing to Phoenix' claims, and the Phoenix was not entitled to make a mere re-assertion of them in face of the court's decisions.

Phoenix having committed the most aggravated fraud against the bridge company and having put the bridge company to enormous expense to extricate itself from such situation, now having granted itself absolution from its fraudulent conduct presumes to come back to the federal court to assert that it is here with clean hands and that its victim is the one whose hands are unclean, and that therefore this case ought to be re-tried.

After citation of authorities, which might be interesting from an academic standpoint, but have no application to this particular case, petitioner attempts to make an application by the bald assertion that the findings and conclusions referred to in the foreclosure cause are contrary to the facts, and insists that upon the application for injunction it was entitled to re-try those issues and prove that those findings and conclusions were not correct, although the case has been fully tried and a petition for rehearing was filed in which every matter attempted to be presented on the injunction hearing (except for discrepancies in the figures which appeared to vary according to the time of the making of a particular affidavit), was fully presented to the trial court.

Most of the authorities cited in Phoenix' brief are cited in 34 Corpus Juris, p. 779, Section 1198, under the heading "Judgments by Consent," note 9, among which is *Lawrence Mfg. Co.* v. *Janesville Cotton Milling Co.*, 138 U. S. 538, containing the language: "The prior decree was the consequence of consent, and not of the

judgment or decree, and this being so, the court had the right to decline to treat it as *res judicata.*" The case of *Hamilton* v. *Houghton,* 4 English Reports 290, cited by petitioner, for Lord Redesdale's Rule, also involved a decree *pro confesso.* Neither of the cases in their facts bear the remotest similarity to the case at bar.

The case of *Union Central Life Insurance Co.* v. *Drake* (8 CCA), 214 Fed. 536, is not similar. That was a second and independent suit and not an ancillary bill to preserve the fruits of the original decree. The court held that when the second suit is upon a different cause of action and between the same parties as the first, the judgment in the former is conclusive in the latter, as to each question which was or might have been presented and determined in the former.

The other cases cited by petitioner are cases not at all similar in facts to the instant case, and have no bearing on the question here presented.

In *Ashby* v. *Manly,* 191 Iowa 113 at 116, it is stated:

> "This count of the answer is the pleading of a counterclaim for fraud in the inception and procurement of the notes sued upon. The demurrer challenges the right to interpose a counterclaim of this character in a suit upon a judgment. If the judgment is valid and binding on the appellant, he cannot now plead, as a setoff or counterclaim to such judgment, the invalidity of the original obligation upon which the judgment was procured. We have held that, in a suit on a judgment, the defendant cannot be allowed to attack the judgment on account of a defense to the cause of action which might be interposed in the action on which the judgment has been recovered, where there is no allegation or proof of fraud in the procurement of the judgment."

Also see *Graves* v. *Graves,* 132 Iowa 199 at 204 and 205.

In *Abell* v. *Partello,* 202 Iowa 1236, 211 N. W. 868, the court said:

> "Equity will not set aside a judgment after a year and award a new trial for a newly discovered evidence where the grounds were discovered, or with reasonable diligence could have been discovered within the year."

And as stated in the *Graves* case, *supra,* "for if this could be done once, it could be done again and again, *ad infinitum.*"

In *Utah Power & Light Co.* v. *U. S.* (Court of Claims), 42 Fed. (2) 304, at 308, the court said:

> "In *Lawrence Mfg. Co.* v. *Janesville Mills,* 138 U. S. 552, 11 S. Ct. 402, 405, 34 L. ed. 1005, the plaintiff sought to have a former consent decree extended and then enforced and the court said:
>
> "'But where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill.'
>
> "Accordingly, the court held that it was at liberty to inquire whether circumstances justified the relief asked, and, the former decree having been entered by consent, the court had the right to decline to treat it as *res adjudicata. But in the case at bar no modification of the former decree is sought, the plaintiff stands on the decree as it is, and the case is not one in which a new trial of the former action can be had.*"

In *Southern Pac. R. Co., et al.* v. *U. S.*, 168 U. S. 1:

> "Whatever is new in the evidence now before us, touching that matter, is simply cumulative on the one side or the other. The application to consider that evidence is practically an application for a rehearing as to things directly determined in the former suits between the same parties, and which adjudication has never been modified. Such a course of procedure is wholly inadmissible under the settled rule of *res judicata.*"

Also see *U. S.* v. *Throckmorton*, 8 Otto 61-71, 25 L. ed. 93.

Deposit Bank of Frankfort v. *Board of Councilmen of the City of Frankfort*, 191 U. S. 499, 24 S. Ct. 154 at 159.

Rew v. *School District*, 125 Iowa 28, 98 N. W. 802.

The italicized statement on pages 97 to 98 of petitioner's brief is absolutely contrary to the original determination in the case. That there was nothing presented in the schedules of testimony proposed to be adduced by deposition or in the allegations of the answer, which were stricken by the trial court, which was not fully covered in the original trial of the case and in the petition for rehearing and affidavits attached to it, and we submit that every claimed item of indebtedness referred to in those schedules and in the proposed answer was passed upon by the trial court and by the Circuit Court of Appeals and held to be without foundation.

POINT EIGHT.

(Answer to Petitioner's Point Eight.)

The fraudulent mortgage was properly ordered satisfied and released.

The petitioner's assertion that the mortgage held fraudulent was a mortgage for $50,000, and for an alleged $9,000 Kramer & Hogg item is wholly without merit. The pretended mortgage has been adjudicated fraudulent and wholly without consideration. The $9,000 item was asserted in the trial as an alleged additional consideration for $97,000 of bonds. The mortgage having its inception in fraud was a dead instrument from the day of its execution, and was so found by the court, and the petitioner cannot now infuse it with life.

The record in this case shows that the court specifically found that the $50,000.00 mortgage was without consideration, fraudulent, and void, and Phoenix Finance Corporation, in contempt of the trial court's finding and decree, has caused said mortgage to be filed of record, and we contend that the bridge company was entitled to a mandatory injunction to remove such mortgage.

Mandatory injunctions may always be issued in the federal courts in proper cases.

> Encyc. Fed. Pro. Vol. 6, sec. 3088, and cases cited
> *Ex parte Lennon*, 166 U. S. 548, 17 Sup. Ct. 658.
> *Loisel, U. S. Marshal* v. *Mortimer*, 277 Fed. 882.
> *Trautwein* v. *Moreno Mut. Irr. Co., et al.*, 22 Fed. (2) 374, 376.
> *Pokegama, S. P. Lumber Co.* v. *Klamath River Lumber & Imp. Co.*, 86 Fed. 528.

It is well settled that a court of equity will protect the title of real property and may, by mandatory injunction, remove a cloud therefrom.

In *Root* v. *Woolworth*, 150 U. S. 401, the court said:

> "The power of the court to issue the judicial writ, or to make the order and enforce the same by a writ of assistance, rests upon the obvious principle that the power of the court to afford a remedy must be coextensive with its jurisdiction over the subject-matter. Where the court possesses jurisdiction to make a decree, it possesses the power to enforce its execution. * * *
>
> "When that court adjudges a title to either real or personal property to be in one as against another, it enforces its judgment by giving the enjoyment of the right to the party in whose favor it has been decided."

In Pom. Eq. Jur., Vol. 4, section 1810, it is stated:

> "Taxes on realty generally, and sometimes those on personalty as well, are made a lien upon real estate. Accordingly, if the proceedings are valid on their face, every such tax will cast a cloud upon the title to land. The prevention and *removal* of such clouds on title are well established and familiar grounds of equitable jurisdiction. Consequently, equity will interfere by injunction to prevent and remove the cloud cast by such an illegal or invalid tax * * *."

In *Key City Gas & Light Company* v. *Munsell, et al.*, 19 Iowa 305, the court held:

> "A court of equity will interpose by injunction to prevent a cloud being cast upon the title to real estate by a sale thereof, under execution against a party not the owner; when it is shown that such property is not subject to the satisfaction of the judgment under which the execution issued."

In *McKibbin* v. *Bristol, et al.*, 50 Mich. 319, 15 N. W. 491, the court held:

> "An equitable owner of lands in actual possession and claiming title in fee simple, can maintain a bill to enjoin a suit in ejectment brought against him by persons claiming under a succession of conveyances given in bad faith and for the purpose of defeating creditors; *and in the same bill he can also ask for a release of the apparent title held by such claimants.*"

In *Grand Rapids Trust Company* v. *Carpenter,* 229 Mich. 491, 201 N. W. 448, the property of a defunct corporation was placed in the hands of a receiver with an order containing the usual clause restraining interference with the receiver. Certain persons claiming to act as trustees of the defunct corporation put a mortgage on the property.

The court said:

> "The mortgage here involved was not only made in defiance of an injunction of the court, but it was upon property held by the receiver, and arm of the court: upon property in the custody of the law. It cannot stand. It is void as to the receiver, as to the court and should be set aside."

There can be no question that the recording of the fraudulent mortgage casts a cloud upon the title of the bridge company. It prevents the court from freely dealing with the property. It constitutes an interference with the jurisdiction of the court and is an attempt to render its decree and findings ineffectual.

Phoenix Finance Corporation, in its petition for rehearing and modification of decree, asked that the decree be modified so as to hold from adjudication the question of the validity of the $50,000.00 mortgage given by the bridge company, reserving the right to Phoenix to

re-litigate in another action, if it so desired (F.R. 223), which petition was overruled (F.R. 411-413).

Now, in face of that ruling, Phoenix contemptuously and viciously casts a cloud on the bridge company's title by filing the fraudulent mortgage and tries to put the bridge company in the position of having to commence an action to quiet title and try over the matters relating to the fraudulent mortgage which have been determined in this case. It is particularly a situation where the court should, by mandatory injunction, remove the cloud.

In *Toucey* v. *New York Life Insurance Company* (8 (CCA), 102 Fed. (2d), p. 16 at p. 20, this court said:

> "The federal court had heard the evidence and determined that Mr. Toucey has no rightful claim against the insurance company on account of the life insurance policy which he had sought to have reinstated and the court's final decree to that effect had been duly entered. If any necessity had been anticipated the federal court would doubtless have gone through the formality coincident with the decree of ordering Mr. Toucey to bring the policy into court for physical destruction by the marshal and would have admonished Mr. Toucey by appropriate writ of order to assert no claims under it."

The petitioner fully recognizes that all of the matters involved herein were adjudicated and determined in this cause when it made its application for modification of decree.

Conclusion.

We respectfully submit that the decision of the Eighth Circuit Court of Appeals should and ought to be affirmed.

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